Record.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 559

HANS PETE MORTENSEN AND LORRAINE MORTENSEN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, GRAND ISLAND DIVISION

No. 357

Criminal Case

UNITED STATES OF AMERICA, Plaintiff,

vs.

HANS PETE MORTENSEN and LORRAINE MORTENSEN, Defendants

INDICTMENT (VIOLATION OF SECTION 398, TITLE 18, UNITED STATES CODE)—Filed January 28, 1941

The grand jurors of the United States of America, drawn from the territory comprising the Omaha, Norfolk, Chadron, Grand Island, and North Platte Divisions of the District of Nebraska, and sitting in the Omaha Division of said District in the term beginning September 23, 1940, being first duly impanelled, sworn, and charged by said Court to inquire within and for said Divisions, upon their oaths do present and say:

That Hans Pete Mortensen and Lorraine Mortensen, on September 4, 1940, did unlawfully, wilfully, knowingly, and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for and in trans-[fol. 2] porting, in interstate commerce from the City of Salt Lake City, in the State of Utah, to the City of Grand Island, in Hall County, in the Grand Island Division of the District of Nebraska, circuit aforesaid, and within the jurisdiction of this Court, a certain girl, to-wit, one Margaret Smith, for the purpose of prostitution and debauchery, and with the intent and purpose to induce, entice, and compel said girl to give herself up to debauchery and to engage in immoral practices; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that the said Hans Pete Mortensen and Lorraine Mortensen, on September 4, 1940, did unlawfully, wilfully, knowingly, and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for and in transporting, in interstate commerce from the City of Salt Lake City, in the State of Utah, to the City of Grand Island, in Hall County, in the Grand Island Division of the District of Nebraska, circuit aforesaid, and within the jurisdiction of this Court, a certain girl, to-wit, one Doris McMahon alias Goldie Wright, for the purpose of prostitution and debauchery, and with the intent and purpose to induce, entice, and compel said girl to give herself up to debauchery and to engage in immoral practices; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America (18 U. S. C. 398).

Emmet L. Murphy, Assistant United States Attorney for the District of Nebraska.

IN UNITED STATES DISTRICT COURT

WAIVER OF READING OF INDICTMENT AND PLEA OF NOT GUILTY —February 4, 1941

Case called for trial. Plaintiff represented by Emmet L. Murphy, Ass't U. S. Attorney. Defendants represented by Thomas W. Lanigan and Wm. P. Mullen.

[fol. 3] Defendants in court with their counsel waive reading of the indictment and plead not guilty.

It Is Ordered that case be set for trial at 10:00 A. M., May 19, 1941.

IN UNITED STATES DISTRICT COURT

PLEA OF DEFENDANTS IN ABATEMENT AND MOTION TO QUASH— Filed March 3, 1941

Come now the defendants and respectfully ask the Court to quash the indictment in this case and abate the proceedings for the following reasons, to-wit:

I

That the true facts in the case which were in the knowledge and possession of the Government officials, who are prosecuting the case, at the time the indictment was returned, do not constitute transportation in interstate commerce within the meaning of Section 398 Title 18 U. S. C., or any other Federal act relating to the White Slave Traffic.

II

The indictment does not reflect the facts and information furnished to the Government agents investigating the case prior to, at the time of, and subsequent to the filing of the complaint and indictment in this case, by the said Margaret Smith and Doris McMahon, alias Goldie Wright, named in the two counts of the indictment as victims, and who testified as chief Government witnesses before the grand jury which returned the indictment.

III

That there exists a material and fatal variance between the facts in the possession of the Government officials investigating the case and known at the time of the return of the indictment and the charges as set forth in the indictment.

IV

That in the event of a trial the evidence on the part of the Government will show a fatal and material variance between the charges as laid in the indictment, which vari- [fol. 4] ance will either result in a directed verdict or be fatal to any verdict of guilty which might be returned.

V

Had the indictment actually set forth the true facts in the possession of the Government, and which will be testified to at the trial by the Government witnesses who testified before the grand jury, it would have charged no violation of Section 398 Title 18 U. S. C., or any other Federal Statute relating to White Slave Traffic, and it would be a waste of Government time, effort and money to call a jury when the evidence that would be brought out at the trial would likely result either in a directed verdict on the Government's testimony, or a verdict which must be set aside.

VI

That the indictment as filed in this case seems to be an attempt to pervert and circumvent the spirit and letter of the acts of Congress relating to White Slave Traffic in that the Government officials who are prosecuting the case were informed of the facts hereinbefore set forth in paragraph eight hereof, prior to the filing of the complaint and the returning of the indictment herein, which facts do not constitute a transportation in interstate commerce within the meaning of Section 398 Title 18 U. S. C., but on the contrary disclose a legal and legitimate transportation, purpose and intent.

VII

That if the Government failed to properly instruct the grand jury as to the law and present to the grand jury the facts which were in its knowledge and possession at the time said matter was under consideration, and which facts were within the knowledge of the witnesses who appeared before the grand jury and which facts as made known to the grand jury would have prevented it returning of a true and valid bill in this case, then the said indictment was returned under a mistake of fact and law and is irregular and void and should be quashed.

VIII

That the defendants are reliably informed that the Government agents in charge of this prosecution prior to, at [fol. 5] the time of, and subsequent to the filing of the complaint and indictment in this case, were informed as follows: That the defendants are husband and wife and reside at Grand Island, Nebraska, and have been such residents for more than two years last past; that in August 1940 defendants were contemplating a summer vacation circle trip from Grand Island through several western states and to return to their home in Grand Island when they had finished their vacation and sight-seeing; that Margaret Smith and Doris McMahon, alias Goldie Wright, named in the first and second count of the indictment, were residents of Grand Island, Nebraska, and proposed to the defendants that they accompany defendants on the vacation trip to the mountains and pay their own expenses; that the defendants agreed to this arrangement and the two girls named in the indictment accompanied the defendants on the vacation circle trip and

paid their own expenses; that on or about the 22nd day of August, 1940, the defendants and the two girls named in the indictment left Grand Island proceeding through Wyoming, Utah and Montana and returning several days later by way of Colorado to Grand Island; that no immoral acts were committed by any of the parties on the trip and that the only intent and purpose was for a vacation with no intent to violate Section 398 Title 18 U. S. C., or any other Federal Statute, for the purpose of prostitution or debauchery or with the intent or purpose to induce, entice and compel said girls to give themselves up to debauchery or to engage in immoral practices, all of which was well known to the Government officials in charge of the prosecution at the time of the returning of the indictment, and said facts do not constitute transportation in interstate commerce within the meaning of the act.

Wherefore, the defendants pray that the Court order the notes and minutes of the grand jury to be brought into court and that the Court order the witnesses appearing before the grand jury or any other witnesses the court may deem proper, to appear and testify, and to permit defendants to produce oral testimony to support the matter set out in this motion; that if upon a hearing on the motion the allegations are true and supported by the evidence [fol. 6] produced, the court quash the indictment filed herein and abate the proceedings.

Hans Pete Mortensen. Lorraine Mortensen.

Duly sworn to by Hans Pete Mortensen and Lorraine Mortensen. Jurat omitted in printing.

In United States District Court

Demurrer of Plaintiff to Plea of Defendants in Abatement and Motion to Quash—Filed March 17, 1941

Comes now the United States of America and demurs to the Plea in Abatement and Motion to Quash of Defendants filed herein, for the following reasons and upon the following grounds:

1. That the Court has no jurisdiction to hear or determine such Plea and Motion filed after entry of plea to the general issue.

2. That the Court has no jurisdiction over the subject matter of said Plea and Motion.

3. That there is an improper joinder in said Plea and Motion in one pleading.

[fol. 7] 4. That said Plea and Motion do not contain or state facts sufficient to constitute any basis for any action by the Court.

United States of America, Plaintiff, by Emmet L. Murphy, Assistant United States Attorney.

In United States District Court

Motion of Defendants to Withdraw Plea of Not Guilty—Filed March 27, 1941

Come now the defendants and respectfully move the court to permit them to withdraw their plea of not guilty entered herein on the 4th day of February, 1941, for the purpose of presenting a plea in abatement heretofore filed in said action, and a motion to direct plaintiff to bring into court a transcript of the testimony taken before the grand jury, if one was made, or a synopsis of said testimony, if a complete transcript was not made, and for permission to file an offer of proof of the facts.

Hans Pete Mortensen, Lorraine Mortensen, Defendants.

In United States District Court

Offer of Defendants to Produce Facts by Oral Testimony —Filed March 27, 1941

Come now the defendants and respectfully offer to prove by oral evidence the following facts, and that said facts were made known to the Government officials in charge of presenting the evidence to the Grand Jury at the time of the returning of the indictment in this case, and in charge of the prosecution of said case, to-wit:

That the defendants are husband and wife, and reside at Grand Island, Nebraska, and have been such residents for more than two years last past; that in August 1940 defendants were contemplating a summer vacation circle

trip from Grand Island through several western states, and to return to their home in Grand Island when they have [fol. 8] finished their vacation and sight seeing; that Margaret Smith and Doris McMahon, alias Goldie Wright, named in the first and second count of the indictment, were residents of Grand Island, Nebraska, and proposed to the defendants that they accompany defendants on the vacation trip to the mountains and pay their own expenses; that the defendants agreed to this arrangement, and the two girls named in this indictment, accompanied the defendants on the vacation circle trip and paid their own expenses; that on or about the 22nd day of August, 1940, the defendants and the two girls named in the indictment, left Grand Island proceeding through Wyoming, Utah and Montana, and returning several days later by way of Colorado to Grand Island; that no immoral acts were committed by any of the parties on the trip, and that the only intent and purpose was for a vacation with no intent to violate Section 398, Title 18, U. S. C., or any other Federal Statute, for the purpose of prostitution or debauchery, or with the intent or purpose to induce, entice and compel said girls to give themselves up to debauchery or to engage in immoral practices.

Hans Pete Mortensen, Lorraine Mortensen, Defendants.

Duly sworn to by Hans Pete Mortensen and Lorraine Mortensen. Jurat omitted in printing.

[fol. 9] In United States District Court

Motion of Defendants to Produce Testimony Presented to Grand Jury—Filed March 27, 1941

Come now the defendants herein and respectfully ask the court to direct the plaintiff to bring into court a complete transcript of the testimony presented to the grand jury upon which the indictment in the case is predicated, or a synopsis of said testimony in the event a complete transcript was not made.

Hans Pete Mortensen. Lorraine Mortensen.

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS TO QUASH—Filed April 11, 1941

Come now the defendants and respectfully make known to the court as follows:

1. That there is no evidence whatever presented to the grand jury to sustain the charge in the indictment.

2. That there was no competent evidence of the offense charged presented to the grand jury.

3. That the offense charged is contrary to the evidence produced before the grand jury.

4. That if the indictment set forth the facts presented to the grand jury the indictment would not state a cause of action.

5. That the indictment was returned under a mistake of law and fact.

6. That heretofore the defendants have filed in this case a offer of proof of the facts and it hereby renews that offer of proof by oral witnesses to sustain this motion to quash.

Wherefore, defendants pray that upon a hearing of the evidence to support this motion the court will sustain this motion to quash.

Lorraine Mortensen, Hans Pete Mortensen, Defendants.

[fol. 10] IN UNITED STATES DISTRICT COURT

ANSWER OF PLAINTIFF TO PLEA OF DEFENDANTS IN ABATEMENT AND MOTIONS TO QUASH—Filed April 16, 1941

Comes now plaintiff, United States of America, by Joseph T. Votava, United States Attorney for the District of Nebraska, and Emmet L. Murphy, Assistant United States Attorney, and for its answer to the plea in abatement and motion to quash and to the substituted motion to quash, alleges and states;

1. It repeats and makes a part hereof the allegations contained in its demurrer heretofore filed herein, and alleges that

(a) The Court has no jurisdiction to hear or determine such Plea and Motions filed after entry of plea to the general issue.

(b) The Court has no jurisdiction over the subject matter of said Plea and Motions.

(c) There is an improper joinder in said Plea and Motion in one pleading.

(d) Said Plea and Motions do not contain or state facts sufficient to constitute any basis for any action by the Court.

2. Further answering Plaintiff denies each and singular every allegation contained in said Plea in Abatement and Motions to Quash.

Wherefore plaintiff prays that said Plea in Abatement and Motions to Quash be overruled and dismissed.

United States of America, Plaintiff, by Joseph T. Votava, United States Attorney, and Emmet L. Murphy, Assistant United States Attorney.

Duly sworn to by Emmet L. Murphy. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

RECORD OF HEARING OF APRIL 16, 1941; DEFENDANTS GIVEN LEAVE TO WITHDRAW PLEAS OF NOT GUILTY; DEMURRER OF PLAINTIFF TO PLEA IN ABATEMENT OVERRULED; MOTION OF DEFENDANTS TO REQUIRE PLAINTIFF TO PRODUCE TESTIMONY BEFORE GRAND JURY OVERRULED; PLEA IN ABATEMENT OF DEFENDANTS AND MOTION TO QUASH THE INDICTMENT OVERRULED; PLEAS OF NOT GUILTY BY DEFENDANTS

Cause called for hearing upon motions and pleas on file. Plaintiff, United States of America, represented by Assistant United States Attorney Emmet L. Murphy, Defendants, Hans Pete Mortensen and Lorraine Mortensen, represented by their attorneys, Thos. Lanigan and Wm. P. Mullen.

Defendants given leave to withdraw their separate pleas of "not guilty". Demurrer to plea in abatement submitted and overruled, with leave to plaintiff to file answer instanter to said plea. Plaintiff given leave to file answer instanter to motion to quash indictment. [plea] in abatement and

motion to quash submitted upon the pleas, motion, answers and evidence given by witnesses offered by defendants. Witness Margaret Smith, sworn in and testimony presented to the court by Defendants attorney. Defendants motion to require plaintiff to produce a transcript or synopsis of testimony before Grand Jury overruled and exception granted. The plea in abatement of defendants, and their motion to quash the indictment are overruled and exceptions allowed.

Defendants are present in Court with their attorneys and each of the defendants states that he or she knows the na-
[fol. 12] ture of the charge in the indictment, and waives reading of the indictment and each pleads "not guilty".

The prior order setting case for trial on May 19th, is set aside.

In United States District Court

Order of January 13, 1943, Denying Application to Review Ruling on Plea in Abatement, etc.—Filed February 27, 1943

Now on this 11th day of January, 1943, prior to the calling of the above entitled case for trial, Thomas W. Lanigan, one of the attorneys for the defendants, appeared before the Court in Chambers and advised that there was pending in this cause a Plea in Abatement, Motion to Quash, Offer to Produce Facts by Oral Testimony and Motion to Produce Testimony presented by the Grand Jury; that said matters should be disposed of before entering the trial of the cause; that upon inquiry, Mr. Lanigan intimated that the matter had not been fully passed upon by Judge Munger, who had formerly presided in the preliminary proceedings in this case; that the Court thereupon advised counsel that he would make an investigation of the record and determine whether the matters had been disposed of; that on the morning of the 13th, before calling the case to trial, and after having examined the record, the Court advised the said Thomas W. Lanigan, and ordered that the orders of Judge Munger would not be disturbed by the Court.

J. A. Donohoe, United States District Judge.

IN UNITED STATES DISTRICT COURT.

JURY IMPANELLED; TRIAL, JANUARY 13, 1943

At 10:10 o'clock, A. M. case called for trial.

Defendants Hans Pete Mortensen and Lorraine Mortensen present in court personally and represented by Thomas W. Lanigan and William P. Mullen as counsel. Jury impaneled and sworn. Opening statements of counsel. Evidence on behalf of the government heard in part. At 4:04 o'clock, P. M. cause adjourned until Thursday morning, January 14, 1943, at 9:30 o'clock, A. M.

[fol. 13] IN UNITED STATES DISTRICT COURT

TRIAL, JANUARY 14, 1943; VERDICTS

At 9:55 A. M., trial proceeds.

Defendants present and by counsel, jury present. Evidence on behalf of government concluded. Evidence on behalf of defendants concluded. Arguments of counsel, instructions of the court, and at 2:20 o'clock, P. M. jury retire for deliberation in charge of a sworn officer of the court. At 3:55 o'clock, P. M. jury return into open court with separate verdicts as to each defendant, finding said defendants "guilty" on Counts Nos. 1 and 2, as charged in the indictment. Jury discharged from further consideration of the case. Defendants remanded to the custody of the United States Marshal.

IN UNITED STATES DISTRICT COURT

VERDICT AS TO DEFENDANT, HANS PETE MORTENSEN.—Filed January 14, 1943

We, The Jury, duly empaneled and sworn to try the issues joined in the above entitled cause, do find the said defendant: Hans Pete Mortensen

guilty as to the First Count,
guilty as to the Second Count,

in manner and form as charged in the Indictment therein.

s/C. S. HOEKSTRA, Foreman.

IN UNITED STATES DISTRICT COURT

VERDICT AS TO DEFENDANT, LORRAINE MORTENSEN.—Filed January 14, 1943

We, The Jury, duly empaneled and sworn to try the issues joined in the above entitled cause, do find the said defendant: Lorraine Mortensen

guilty as to the First Count,
guilty as to the Second Count,

in manner and form as charged in the Indictment therein.

s/C. S. HOEKSTRA, Foreman.

[fol. 14] IN UNITED STATES DISTRICT COURT

INSTRUCTIONS No. 1 OFFERED BY DEFENDANT.—Filed Jan. 14, 1943

If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska and that the final destination was Grand Island, Nebraska, and that the states of Colorado, Wyoming, and Utah, were incidentally gone through, you are instructed that the White Slave Traffic Act specifically provides that the words "interstate commerce", as used in the act shall "include transportation from one state * * * to another state". This definition necessarily excludes, by implication, transportation from one point in a state to the same point within the same state and if you so find them you shall bring in a verdict of not guilty as to both Defendants on each count of the indictment.

U. S. vs. Wilson 266 Fed. 712.

Refused Ex
J. A. D.

In United States District Court

Judgment and Commitment as to Defendant, Hans Pete Mortensen—Filed January 15, 1943

On this 15th day of January, 1943, came the United States Attorney, and the defendant Hans Pete Mortensen appearing in proper person, and represented by Thomas W. Lanigan and William P. Mullen, as counsel, and,

The defendant having been convicted on a verdict of Guilty of the offenses charged in the indictment in the above-entitled cause, to wit:

Transporting a woman in interstate commerce for the purpose of debauchery and immoral practices, as charged in Count No. 1 of the indictment, and Transporting a woman in interstate commerce for the purpose of debauchery and immoral practices, as charged in Count No. 2 of the indictment,

and the defendant having been now asked whether he has anything to say why judgment should not be pronounced [fol. 15] against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered And Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative who shall designate the place or places where said sentence shall be served, for the period of Three (3) years on Count No. 1 of the indictment, and for a like period of Three (3) years on Count No. 2 of the indictment, said periods of time to run concurrently and not consecutively; and it is further ordered and adjudged by the Court that said defendant shall pay a fine in the sum of Five Hundred Dollars ($500.00) on Count No. 1 of the indictment, and a further sum of Five Hundred Dollars ($500.00) on Count No. 2 of the indictment, and that said defendant be further imprisoned until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

J. A. Donohoe, United States District Judge.

In United States District Court

Judgment and Commitment as to Defendant, Lorraine Mortensen.—Filed January 15, 1943

On this 15th day of January, 1943, came the United States Attorney, and the defendant Lorraine Mortensen appearing in proper person, and represented by Thomas W. Lanigan and William P. Mullen, as counsel, and,

The defendant having been convicted on a verdict of Guilty of the offenses charged in the indictment in the above-entitled cause, to wit:

Transporting a woman in interstate commerce for the purpose of debauchery and immoral practices, as charged in Count No. 1 of the indictment, and Transporting a woman in interstate commerce for the purpose of debauch-
[fol. 16] ery and immoral practices, as charged in Count No. 2 of the indictment,

and the defendant having been now asked whether she has anything to say why judgment should not be pronounced against her, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

Ordered And Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative who shall designate the place or places where said sentence shall be served, for the period of Three (3) years on Count No. 1 of the indictment, and for a like period of Three (3) years on Count No. 2 of the indictment, said periods of time to run concurrently and not consecutively, and that said defendant be further imprisoned until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

J. A. Donohoe, United States District Judge.

In United States District Court

Motion of Defendants for New Trial—Filed January 15, 1943

Come now the defendants and each thereof individually and asks for a new trial herein and as reasons and grounds therefore shows to the Court:

1. That there was irregularity in the proceedings of the Court prejudicial to the rights of the defendants as follows to-wit: the Prosecuting Attorney was permitted by the Court over the objections of the defendants to state in his opening statement that "he would prove certain facts", that said facts if proven, would constitute a violation of Section 28-919 of the Compiled Statutes of Nebraska for 1929, which statement was made for the sole purpose of prejudicing the Jury against the defendants on trial and which statement constituted fatal, prejudicial and reversable error and which evidence would be immaterial and was wholly unnecessary to prove the charges as laid in the indictment.

[fol. 17]

2. That there was irregularity in the proceedings of the Court prejudicial to the rights of the defendants as follows to-wit: that the Prosecuting Attorney and the witnesses for the Government, prejudicial to the rights of the defendants, over the objections of the defendants, as follows: to-wit: That the Prosecuting Attorney elicited from the witnesses, Doris McMahon, alias Goldie Wright, Margaret Smith, James L. Flood, and Lurline Allisson evidence, that defendants had committed a misdemeanor under the laws of the State of Nebraska, which would constitute a misdemeanor and violation of Section 28-919, of the Compiled Statutes of Nebraska for 1929 for the sole purpose of prejudicing the Jury against the defendants on trial and the introduction of such evidence constituting fatal, prejudicial, and reversable error and which evidence was immaterial and was wholly unnecessary to prove the charges as laid in the indictment.

3. That there was irregularity in the proceedings of the Court prejudicial to the rights of the defendants as follows to-wit: the Prosecuting Attorney, over the objections of the defendants, devoted the major part of his evidence in a description of the lurid details of the house of prostitu-

tion, operated by the defendants and so inflamed and prejudiced the Jury, and such testimony over-shadowed the scant testimony introduced by the Government on the indictment before the Court that the instruction given by the Court "to only consider such testimony as a circumstances of intent", were not able to eradicate from the Jury's mind the prejudice planted therein, and the verdict was the result of passion and prejudice as is more fully shown by the affidavit of James A. Cannon hereto attached and made a part hereof.

4. That the Court errored in permitting the Prosecuting Attorney for the Government, over the objections of the defendants to introduce evidence of bad character of the defendants in the first instant, when character was not put in issue at any time during the trial by the defendants.

[fol. 18] 5. Abuse of discretion by the Court which prevented the defendants from having a fair trial as follows, to-wit: the Court permitted the Prosecuting Attorney to introduce a great volume of evidence going into the lurid details of the operation of a house of prostitution for about two years prior to September 4, 1940, and more than a year thereafter and permitting the witness to testify as to such minute details as the division of profits and who called the various girls to rooms for men customers and a page from a ledger sheet as to certain earnings by the witness which evidence was introduced for the sole purpose of prejudicing the Jury against the defendant on trial and said evidence constituted fatal, prejudicial and reversable error and which evidence was immaterial and was wholly unnecessary to prove the charges as laid in the indictment.

6. That there was error in the proceedings of the Court and the Prosecuting Attorney in that the Court over the objections of the defendants, permitted the Prosecuting Attorney in his closing argument to the Jury, to describe the lurid — of the operation of a house of prostitution.

7. That the verdict is contrary to law.

8. Errors of law occurring at the trial.

9. The Court errored in refusing to give instructions number 1 tendered by the defendants.

10. The Court errored in refusing to give instructions number 2 tendered by the defendants.

11. The Court errored in refusing to give instructions number 3 tendered by the defendants.

12. The Court errored in refusing to give instructions number 4 tendered by the defendants.

13. The Court errored in overruling defendants Motion to Dismiss and Discharge the Jury after the Government rested its case, a copy of which Motion is hereto attached.

14. The Court errored in overruling the Motion for a Directed Verdict of Not Guilty, as to each of the defendants at the close of the Government's case.

15. That prior to the trial, Federal Judge T. C. Munger, now deceased, errored in refusing defendants offer to prove [fol. 19] the facts alleged in the Plea in Abatement and Motion to Quash, a copy of which Plea and Motion and offer is hereto attached and made a part hereof.

16. That there was a fatal variance between the evidence offered by the Government and the indictment, in that the evidence discloses beyond a reasonable doubt that the transportation in this case, originated in a point in Nebraska and final destination was a point in Nebraska and the transportation in or through the State of Utah, was incidental to said trip and said transportation was not within the [definitation] or meaning of the "interstate commerce" as used in the White Slave Traffic Act under Section 397, Title 18, of the U. S. Code, but regardless of said fatal variance, the Court over the objections of the defendants permitted said case to go to the Jury on the charges as laid in the indictment.

17. That two verdicts were given to the Jury instead of eight and in said two from verdicts the word guilty appeared and a blank line before the word guilty and being necessary for the Jury to fill in *not* before the word guilty in order to find the defendants not guilty and this was prejudicial to the defendants.

Hans Pete Mortensen, Lorraine Mortensen, by Thomas W. Lanigan & Wm. P. Mullen, Their Attorneys.

COPY OF PLEA IN ABATEMENT AND MOTION TO QUASH ATTACHED TO MOTION FOR NEW TRIAL—Filed March 17, 1941

Come now the defendants, and respectfully ask the Court to quash the indictment in this case, and abate the proceedings for the following reasons, to-wit:

I

That the true facts in the case which were in the knowledge and possession of the Government officials who are prosecuting the case, at the time the indictment was re- [fol. 20] turned, do not constitute transportation in interstate commerce within the meaning of Section 398, Title 18, U. S. C., or any other Federal act relating to the White Slave Traffic.

II

The indictment does not reflect the facts and information furnished to the Government agents investigating the case prior to, at the time of, and subsequent to the filing of the complaint and indictment in this case, by the said Margaret Smith and Doris McMahon, alias Goldie Wright, named in the two counts of the indictment as victims, and who testified as chief Government Witnesses before the grand jury which returned the indictment.

III

That there exists a material and fatal variance between the facts in the possession of the Government officials investigating the case and known at the time of the return of the indictment and the charges as set forth in the indictment.

IV

That in the event of a trial the evidence on the part of the Government will show a fatal and material variance between the charges as laid in the indictment, which variance will either result in a directed verdict or be fatal to any verdict of guilty which might be returned.

V

Had the indictment actually set forth the true facts in the possession of the government, and which will be testified to at the trial by the government witnesses who testi-

fied before the grand jury, it would have charged no violation of Section 398 Title 18 U. S. C., or any other Federal Statute relating to White Slave Traffic, and it would be a waste of Government time, effort and money to call a jury when the evidence that would be brought out at the trial would likely result either in a directed verdict on the government's testimony, or a verdict which must be set aside.

[fol. 21]

VI

That the indictment as filed in this case seems to be an attempt to pervert and circumvent the spirit and letter of the acts of Congress relating to White Slave Traffic in that the Government officials who are prosecuting the case were informed of the facts hereinbefore set forth in paragraph eight hereof, prior to the filing of the complaint and the returning of the indictment herein, which facts do not constitute a transportation in interstate commerce within the meaning of Section 398 Title 18 U. S. C., but on the contrary disclose a legal and legitimate transportation, purpose and intent.

VII

That if the government failed to properly instruct the grand jury as to the law, and present to the grand jury the facts which were in its knowledge and possession at the time said matter was under consideration, and which facts were within the knowledge of the witnesses who appeared before the grand jury, and which facts as made known to the grand jury would have prevented it returning of the true and valid bill in this case, then the said indictment was returned under a mistake of fact and law and is irregular and void and should be quashed.

VIII

That the defendants are reliably informed that the Government agents in charge of this prosecution prior to, at the time of, and subsequent to the filing of the complaint and indictment in this case, were informed as follows: That the defendants are husband and wife and reside at Grand Island, Nebraska, and have been such residents for more than two years last past; that in August 1940 defendants were contemplating a summer vacation circle trip from Grand Island through several western states, and to return to their home in Grand Island, when they had finished their

vacation and sight-seeing; that Margaret Smith and Doris McMahon, alias Goldie Wright, named in the first and second count of the indictment, were residents of Grand Island, Nebraska, and proposed to the defendants that they accompany defendants on the vacation trip to the mountains, and pay their own expenses; that the defendants agreed to this [fol. 22] arrangement and the two girls named in the indictment accompanied the defendants on the vacation circle trip and paid their own expenses; that on or about the 22nd day of August, 1940, the defendants and the two girls named in the indictment left Grand Island proceeding through Wyoming, Utah and Montana, and returning several days later by way of Colorado to Grand Island; that no immoral acts were committed by any of the parties on the trip and that the only intent and purpose was for a vacation with no intent to violate Section 398 Title 18 U. S. C., or any other Federal Statute, for the purpose of prostitution or debauchery or with the intent or purpose to induce, entice and compel said girls to give themselves up to debauchery or to engage in immoral practices, all of which was well known to the government officials in charge of the prosecution at the time of the returning of the indictment, and said facts do not constitute transportation in interstate commerce within the meaning of the act.

Wherefore, the defendants pray that the court order the notes and minutes of the grand jury to be brought into court, and that the Court order the witnesses appearing before the grand jury or any other witnesses the Court may deem proper, to appear and testify, and to permit defendants to produce oral testimony to support the matter set out in this motion; that if upon a hearing on the motion the allegations are true and supported by the evidence produced, the Court quash the indictment filed herein and abate the proceedings.

Hans Pete Mortensen, Lorraine Mortensen, Defendants.

* * * * * * *

Duly sworn to by Hans Pete Mortensen and Lorraine Mortensen. Jural omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

Motion of Defendants to Dismiss Action and Discharge Jury

Come now the defendants, and each of them and move the Court to dismiss the action, and discharge the jury for the following reasons to-wit:

That there is a material and fatal variance between the evidence and the indictment in that:—

a. That the indictment does not inform the accused of the nature and cause of the accusation against them and each of them and therefore defendants cannot properly defend themselves.

b. That a verdict of guilty or not guilty, in this case would not preclude another indictment and prosecution arising out of the identical transportation alleged in the indictment.

c. That the indictment does not apprise the defendant of what they must meet to protect them against another prosecution and misleads them.

d. That the evidence fails to disclose an illegal purpose or intent on the part of the defendants as is required to be proven by the Government under Section 398, Title 18 of the U. S. Code.

e. That the evidence fails to establish that the transportation in the case was from one state to another as required to be proven by the Government under Title 18, Section 398 of the U. S. Code.

[fol. 24] f. That the evidence established beyond a reasonable doubt that the transportation in this case was from Grand Island, Nebraska, to Grand Island, Nebraska.

g. That the White Slave Traffic Act specifically provides that the words Interstate Commerce as used in the action shall include transportation from one state to another state. This definition necessarily excludes, by implication, transportation from one point in the state to a point in the same state, the words from and to, as used in the act manifestly referring to two different states as the respective points of origin and final destination of the transportation, and not a state through which the women *is* carried as a

mere incident to the through transportation, that the evidence established beyond a reasonable doubt that the transportation in this case originated in Grand Island, Nebraska, and the final destination was Grand Island, Nebraska, and that the transportation in or through the states of Wyoming, Colorado, and Utah, was incidental to said trip and therefore said transportation was not within the definition or meaning of the Interstate Commerce as used in the White Slave Traffic Act under Section 397, Title 18, of U. S. Code.

h. That the evidence establishes beyond a reasonable doubt that the transportation in this case was at the solicitation expenses, and request of the women named in the indictment and that the purpose of said transportation was for legitimate purposes, namely a vacation, and not for purposes of prostitution or debauchery, and was not within the intent and purpose on the part of the defendants to induce, entice, and compel said women to give themselves up to debauchery or engage in immoral purposes as is required to be proven by the Government under Section 398, Title 18, of U. S. Code.

i. That the Government in its case and chief has introduced evidence of bad character of the defendants when good character was not put in issue by the defendants, and the introduction of said evidence constitutes fatal prejudicial and reversable error for the basis of this trial.

j. That the Government in its case and chief has introduced evidence which constituted a violation of Section 28-919 of the Compiled Statutes of Nebraska, 1929, a mis- [fol. 25] demeanor, for the sole purpose of prejudicing the Jury against the defendants on trial and the introduction of said evidence constitutes fatal prejudicial and reversable error for the basis of this trial.

Hans Pete Mortensen, Lorraine Mortensen.

In United States District Court

Application of Defendants to Grant Bail and Cost Bond on Appeal, and Fix Amount Thereof—Filed January 15, 1943.

Come now the defendants, Hans Pete Mortensen, and Lorraine Mortensen and makes known to the Court that

they intend to lodge an appeal to the Circuit Court of Appeals for the Eighth Circuit, from the verdict of guilty and the overruling of the motion for a new trial, in the above entitled action on substantial and meritorious grounds as is more fully set forth in the Motion for a new trial hereto attached and made a part hereof.

Wherefore defendants pray that the Court grant bail and cost bond on appeal to said defendants and fix the amount thereof.

Hans Petg Mortensen, Lorraine Mortensen, By Thomas W. Lanigan, & Wm. P. Mullen, Their Attorneys.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL AND FIXING BAIL BOND ON APPEAL--Filed January 15, 1943

This cause coming on to be heard upon the motion for a new trial filed by the defendants herein, and defendants thereupon offering in support thereof a certain affidavit of one James A. Cannon, one of the jurors impaneled in said cause; and plaintiff having moved to strike said affidavit from the files for the reason that the same is incompetent, immaterial and constitutes an attempt by a juror to impeach the verdict of the jury herein; whereupon it is [fol. 26] Ordered by the Court that said motion be, and the same is, hereby sustained and said affidavit is hereby stricken from the files herein. To which ruling defendants except.

And this cause coming on further for hearing upon the motion of defendants for a new trial, and the court having considered said motion, it is

Ordered by the Court that said motion for a new trial be, and hereby is, overruled and a new trial is denied. To which ruling defendants except.

And this cause coming on further for hearing upon the application of defendants, to have amount of appeal bond fixed; and the Court being of the opinion that there is involved a substantial question which should be determined by the appellate court, it is

Ordered by the Court that bail bond for the purpose of an appeal and to stay the judgment and sentence of the

court pending such appeal, be, and the same is, hereby fixed in the sum of Four Thousand Dollars ($4000.00), for each defendant; and upon furnishing such bail with good and sufficient surety to be approved by this court, said defendants be released from custody pending such appeal.

By the Court,

J. A. Donohoe, Judge.

IN UNITED STATES DISTRICT COURT

BAIL AND COST BOND OF DEFENDANT, HANS, PETE MORTENSEN —Filed January 15, 1943

Know All Men By These Presents, That we Hans Pete Mortensen principal, and A. D. Finlay and E. C. Finlay, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Four Thousand ($4000.00) Dollars to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of January, 1943.

[fol. 27] Whereas, lately, at the January Term, A. D. 1943, of the District Court of the United States, Grand Island Division, in a suit depending in said Court between the United States of America, plaintiff, and Hans Pete Mortensen defendant, a judgment and sentence was rendered against the said Hans Pete Mortensen and the said Hans Pete Mortensen has taken an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment and sentence in the aforesaid suit;

Now, the condition of the above obligation is such that if the said Hans Pete Mortensen shall prosecute said appeal to effect, and if appellant fails to make his appeal good, shall answer all costs and shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said appeal, and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed

from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States for the District of Nebraska, Grand Island Division, on such day or days as may be appointed for a retrial by said District Court, and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit, then the above obligation to be void, otherwise to remain in full force, virtue, and effect.

Hans Pete Mortensen, A. D. Finlay, E. C. Finlay.

Witness to signatures: Sidney J. Gottneid, Wm. P. Mullen.

Approved:

J. A. Donohoe, Judge.

[fol. 28] State of Nebraska,
County of Hall, ss:

A. D. Finlay and E. C. Finlay, sureties on the foregoing bond, being each duly sworn, deposes and says that they reside at Louisville and Omaha, Nebr., respectively; that they are worth the sum of $17,500.00 Dollars over and above all debts and liabilities in property subject to execution and sale, and that said property consists of Lots One (1) and two (2), Block Forty-nine (49) Original City of Omaha, Douglas County, Nebraska, the title to all of which stands in my name.

(Affiant's signature) A. D. Finlay, E. C. Finlay.

Subscribed in my presence and sworn to before me this 15th day of January, 1943. Mary A. Mullen, Clerk U. S. District Court, by Sidney J. Gottneid, Chief Deputy. (Seal.)

In United States District Court

Bail and Cost Bond of Defendant, Lorraine Mortensen—Filed January 15, 1943

Know All Men By These Presents, That we Lorraine Mortensen, principal, and A. D. Finlay and E. C. Finlay, as sureties, are held and firmly bound unto the United

States of America in the full and just sum of Four Thousand ($4000.00) Dollars to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 15th day of January, 1943.

Whereas, lately, at the January Term, A. D. 1943, of the District Court of the United States, Grand Island Division, in a suit depending in said Court between the United States of America, plaintiff, and Lorraine Mortensen, defendant, a judgment and sentence was rendered against the [fol. 29] said Lorraine Mortensen and the said Lorraine Mortensen has taken an appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment and sentence in the aforesaid suit;

Now, the condition of the above obligation is such that if the said Lorraine Mortensen shall prosecute said appeal to effect, and if appellant fails to make his appeal good, shall answer all costs and shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Eighth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his said appeal, and shall abide by and obey all orders made by the United States Circuit Court of Appeals for the Eighth Circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed or the appeal is dismissed; and if he shall appear for trial in the District Court of the United States for the District of Nebraska, Grand Island Division, on such day or days as may be appointed for a retrial by said District Court, and abide by and obey all orders made by said Court provided the judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals for the Eighth Circuit, then the above obligation to be void, otherwise to remain in full force, virtue, and effect.

Lorraine Mortensen, A. D. Finlay, E. C. Finlay.

Witness to Signature: Sidney J. Gottneid, Wm. P. Mullen.

Approved:

J. A. Donohoe, Judge.

STATE OF NEBRASKA,
County of Hall, ss:

A. D. Finlay and E. C. Finlay, sureties on the foregoing bond, being duly sworn, deposes and says that they reside at Louisville and Omaha, Nebr., respectively, that they are [fo]. 30] worth the sum of $17,500.00 Dollars over and above all debts and liabilities in property subject to execution and sale, and that said property consists of Lots One and Two (1 and 2) in Block Forty-nine (49) in the Original City of Omaha, Douglas County, Nebraska, the title to all of which stands in my name.

(Affiant's signature) A. D. Finlay, E. C. Finlay.

Subscribed in my presence and sworn to before me this 15th day of January, 1943. Mary A. Mullen, Clerk U. S. District Court, by Sidney J. Gottneid, Chief Deputy. (Seal.)

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 18, 1943

To Joseph T. Votova, United States District Attorney.

You are hereby notified that Hans Pete Mortensen and Lorraine Mortensen, defendants herein, intend to appeal to the Circuit Court of Appeals in the Eighth Judicial Circuit from verdicts of guilty on all counts returned on January 14, 1943 in the District Court of the United States within and for the Grand Island Division of the District of Nebraska, in the Eighth Judicial Circuit, against each of said defendants for violation of Section 398 Title 18 of the United States Code.

You are further notified that application to grant bail and costs bond on appeal was granted on the 15th day of January, 1943 by the Hon. J. A. Donahue, United States District Judge, for the District of Nebraska; said Court finding that substantial questions were involved. which should be passed on by the Circuit Court of Appeals; and also fixed the bond of each of said defendants in the sum of Four Thousand ($4000.00) Dollars, which bond was filed by each of said defendants and approved by the Court.

[fol. 31] Dated at Grand Island, Nebraska this 16th day of January, 1943.

Hans Pete Mortensen, Lorraine Mortensen, Defendants, by Thomas W. Lanigan, Wm. P. Mullen, Their Attorneys.

In United States District Court

Amended Notice of Appeal—Filed February 4, 1943

Name and address of appellant Hans Pete Mortensen and Lorraine Mortensen, Grand Island, Nebraska.

Name and address of appellants attorney Thomas W. Lanigan, Grand Island, Nebraska; Wm. P. Mullen, Grand Island, Nebraska.

Offense White Slave Act Sec. 398, Title 18 U. S. C.; 2 counts.

Date of Judgment January 14th, 1943.

Brief description of judgment or sentence Hans Pete Mortensen, guilty on 2 counts, sentenced to 3 years and fined $1000.00. Lorraine Mortensen guilty of 2 counts sentenced to 3 years.

Name of prison where now confined, if not on bail

Both defendants out on bail bond of $4000 for each defendant. Bond approved by the Judge on January 15th, 1943.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment above-mentioned on the grounds set forth below.

Hans Pete Mortensen, Lorraine Mortensen, Appellants.

Dated January 25, 1943.

Grounds of appeal:

Verdict contrary to Evidence: Whether the evidence brought the defendants under the definition of the White [fol. 32] Slave Act in proceeding from a point within Nebraska and returning to a point within Nebraska. Error of the court in permitting evidence of other crimes introduced by the government: Overruling motions for withdrawal of jurors and directed verdicts; Error in overruling

motions to quash and plea in Abatement and other assignments more fully set forth in the motion for a new trial.

(Duplicate Notice of Appeal and Duplicate Amended Notice of Appeal Filed in Appellate Court)

The Duplicate Notice of Appeal and the Duplicate Amended Notice of Appeal were filed in the United States Circuit Court of Appeals on February 8, 1943, but same are omitted from the printed record at this place to avoid duplication inasmuch as the Notice of Appeal and the Amended Notice of Appeal heretofore appear in the printed record at folio pages 42 and 43 hereof.

In United States District Court

Order for Appearance of Counsel for Directions in Regard to Preparation of Transcript on Appeal—Filed February 23, 1943

To The Honorable Joseph T. Votava, United States Attorney, and Emmet L. Murphy, Assistant United States Attorney for the District of Nebraska, and

To Thomas W. Lanigan and William P. Mullen, Attorneys for the Above Named Defendants:

You, and each of you, are hereby notified and directed to appear before me at Chambers in the United States District Court in the Post Office Building at Omaha, Nebraska; at 10:00 o'clock A. M., Friday, February 26, 1943, at which time such directions will be given as may be appropriate with respect to the preparation of the record on appeal herein, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings.

It Is Further Ordered that notice of this hearing shall be given to said above named Attorneys for Defendants by the Clerk of this Court by mailing a copy of this No-[fol. 33] tice and Order to said Defendants at Grand Island, Nebraska.

Dated at Omaha, Nebraska, this 23rd day of February, 1943.

J. A. Donohoe, United States District Judge.

In United States District Court

Assignment of Errors Filed By Hans Pete Mortensen—Filed March 9, 1943

Comes now Hans Pete Mortensen, one of the defendants and appellant in the above entitled case, and in connection with his appeal assigns the following errors, which he as defendant avers occurred at the trial of said case, and that the action and ruling of the Court upon each of said matters was at the time duly excepted to and such exception was then allowed by the Court and upon which errors he relies to reverse the judgment and sentence entered and imposed by the Court in this case as the same appears of record.

1. Because the Trial Court erred in overruling the Plea in Abatement filed in this case.

2. Because the Trial Court erred in overruling the Motion to Quash filed in this case.

3. Because the Trial Court erred in denying his written Offer to Produce Facts by oral Testimony.

4. The Trial Court erred in denying his written Motion requesting the Government to produce the testimony presented to the Grand Jury upon which the Indictment was had.

5. Because the Trial Court erred in denying his application to review the previous ruling of Honorable Thomas C. Munger on the Plea in Abatement, Motion to Quash, Written Offer to Produce Oral Testimony and his Motion to require the Government to produce the testimony given before the Grand Jury which returned the Indictment in this case.

[fol. 34] 6. Because the Trial Court erred in overruling the Motion to Dismiss the Prosecution and to Discharge the Jury, which Motion was made at the conclusion of all of the evidence in the case and after both sides had rested their respective cases.

7. Because the Trial Court erred in overruling the Motion For a New Trial filed in this case.

8. Because the Trial Court erred in refusing to give the following Instruction requested by the defendant;—

"If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska and that the final destination was Grand Island, Nebraska, and that the states of Colorado, Wyoming, and Utah, were incidentally gone through, you are instructed that the White Slave Traffic Act specifically provides that the words 'interstate commerce,' as used in the Act shall 'include transportation from one state . . . to another state'. This definition necessarily excludes, by implication, transportation from one point in a state to the same point within the same state and if you so find then you shall bring in a verdict of not guilty as to both Defendants on each count of the indictment."

9. Because the Trial Court erred in refusing to give the following Instruction requested by the defendant:—

"The Jury is instructed that the United States Code makes the intent and purpose an element of the crime, and if the journey was planned with no immoral purpose at the time, no crime was committed, no matter what may have occurred thereafter. It is the immoral purpose which renders interstate commerce criminal. If you find from the evidence that the journey in this case, was planned with no immoral purpose and with no intent and purpose to induce, entice and compel the said girls, named in the indictment, to give themselves up to debauchery and engage in immoral practices, then you shall find the defendants and each of them not guilty on each count of the indictment."

10. Because there was no sufficient or proper allegations of Intent, in the two counts of the Indictment or either of [fol. 35] them, which would satisfy the requirements of Section 398 of Title 18 U. S. C. A., upon which said two counts of the Indictment were grounded.

11. Because said Indictment in its two Counts and each of said Counts fails to allege in the language of the statute, to-wit,—Section 398 of Title 18 U. S. C. A., or in language of similar import, the offenses attempted to be pleaded.

12. Because said Indictment in its two Counts and each of said Counts fails to plead sufficient facts so as to bring the matters alleged within the law and to inform this defendant with sufficient particularity and certainty as to the

precise charge attempted to be made against him and fails to disclose to the defendant the necessary and proper facts relative to the claimed commission of the alleged offenses.

13. Because said Indictment in its two Counts and each of said Counts contains mere conclusions and does not plead facts.

14. Because said Indictment in its two counts and each of said Counts is vague, indefinite and uncertain and does not allege sufficient facts or circumstances tending to identify the particular offenses attempted to be charged therein.

15. Because the Indictment in its two Counts and each of said Counts is not sufficiently informative, specific, definite and certain to satisfy constitutional requirements under the applicable portions of the 5th and 6th Amendments to the Constitution of the United States.

16. Because said Indictment in its two Counts and each of said Counts does not charge the commission of any crime against the laws of the United States and fails to set forth properly and with the requisite definiteness and particularity all of the essential elements of the crimes attempted to be charged under Section 398 of Title 18 U. S. C. A.

17. Because the United States of America has failed to prove by evidence the allegations of the Indictment in its two Counts and each of said Counts.

[fol. 36] 18. Because the proof offered by the United States of America, as to the two counts of the Indictment and each of said counts, is insufficient in law and is not of such probative force as to amount to proof of guilt by evidence beyond a reasonable doubt as required by the law.

19. Because as to each of the Counts of the Indictment the Government failed to prove upon the trial of this case, by evidence beyond a reasonable —, the requisite and necessary criminal intent as required by Section 398 of Title 18 U. S. C. A., the law upon which this prosecution was grounded.

20. Because the Trial Court erred in denying the witness Doris McMahon her Constitutional right not to be compelled to give incriminating evidence against herself and compelled her to give incriminatory answers to questions propounded to her by Emmett L. Murphy, Assistant United

States Attorney, which questions related to the alleged interstate transportation and as to acts of prostitution before and after said transportation.

21. Because the Court and the Assistant United States Attorney failed to advise the witness Margaret Smith of her Constitutional right relating to self-incrimination.

22. That the verdict of the Jury is contrary to the law, contrary to the evidence and not sustained by the evidence.

23. That the judgment and sentence of the Court is contrary to the law, contrary to the evidence and not sustained by the evidence.

24. Because the Court erred in overruling the Motion for a directed verdict of not guilty made and filed at the conclusion of the evidence in this case and after both sides had rested their respective cases.

25. Because there was a fatal variance between the allegations contained in the Indictment, in its two counts and each of said counts, and the proof offered by the Government in support thereof in that the transportation alleged in both counts of the Indictment were from Salt Lake City, Utah, to Grand Island, Nebraska, whereas the evidence showed, a circle vacation trip by defendant's automobile, [fol. 37] each party paying their own expenses, from Grand Island, Nebraska, through several states and then to Salt Lake City, Utah, and then back to Grand Island, Nebraska, there being no proof of any prostitution having taken place during said circle vacation trip and the only prostitution proved was prostitution before leaving Grand Island, Nebraska, and after returning there. That the alleged transportation of the two women in "interstate commerce" was not that defined by Section 397 of Title 18 U. S. C. A. or that denounced by Section 398 of Title 18 U. S. C. A.

26. Because only one verdict was submitted by the Trial Court to the Jury, instead of four possible verdicts and in the two verdicts submitted to the jury the word guilty appeared with blank lines before said word, making it necessary for the jury to write in the word "not" before the word guilty, which was highly prejudicial to the defendant.

Wherefore, the defendant, Hans Pete Mortensen, prays that the judgment and sentence of the United States District Court for the District of Nebraska, Grand Island Division be reversed, and that the said United States District Court for the District of Nebraska, Grand Island Division, be directed to dismiss the Indictment in its two Counts, and each of said Counts, against said defendant and that said defendant be discharged.

Hans Pete Mortensen, by Eugene D. O'Sullivan, One of His Attorneys.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS FILED BY LORRAINE MORTENSEN—Filed March 9, 1943

Comes now Lorraine Mortensen, one of the defendants and appellant in the above entitled case, and in connection with her appeal assigns the following errors, which she as defendant avers occurred at the trial of said case, and that the action and ruling of the Court upon each of said matters was at the time duly excepted to and such exception was then allowed by the Court and upon which errors she relies [fol. 38] to reverse the judgment and sentence entered and imposed by the Court in this case as the same appears of record.

1. Because the Trial Court erred in overruling the Plea in Abatement filed in this case.

2. Because the Trial Court erred in overruling the Motion to Quash filed in this case.

3. Because the Trial Court erred in denying her written Offer to Produce Facts by oral Testimony.

4. Because the Trial Court erred in denying her written Motion requesting the Government to produce the testimony presented to the Grand Jury upon which the Indictment was had.

5. Because the Trial Court erred in denying her application to review the previous ruling of Honorable Thomas C. Munger on the Plea in Abatement, Motion to Quash, written Offer to Produce Oral Testimony and his Motion to

require the Government to produce the testimony given before the Grand Jury which returned the Indictment in this case.

6. Because the Trial Court erred in overruling the Motion to Dismiss the Prosecution and to Discharge the Jury, which Motion was made at the conclusion of all of the evidence in the case and after both sides had rested their respective cases.

7. Because the Trial Court erred in overruling the Motion for a New Trial filed in this case.

8. Because the Trial Court erred in refusing to give the following Instruction requested by the defendant:—

"If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska and that the final destination was Grand Island, Nebraska, and that the states of Colorado, Wyoming, and Utah, were incidentally gone through, you are instructed that the White Slave Traffic Act specifically provides that the words 'interstate commerce,' as used in the Act shall 'include transportation from one state * * * to another state.' This definition necessarily excludes, by implication, transportation [fol. 39] from one point in a state to the same point within the same state and if you so find then you shall bring in a verdict of not guilty as to both Defendants on each count of the indictment."

9. Because the Trial Court erred in refusing to give the following Instruction requested by the defendant:—

"The Jury is instructed that the United States Code makes the intent and purpose an element of the crime, and if the journey was planned with no immoral purpose at the time, no crime was committed, no matter what may have occurred thereafter. It is the immoral purpose which renders interstate commerce criminal. If you find from the evidence that the journey in this case, was planned with no immoral purpose and with no intent and purpose to induce, entice and compel the said girls, named in the indictment, to give themselves up to debauchery and engage in immoral practices, then you shall find the defendants and each of them not guilty on each count of the indictment."

10. Because there was no sufficient or proper allegations of Intent, in the two counts of the Indictment or either of

them, which would satisfy the requirements of Section 398 of Title 18 U. S. C. A., upon which said two counts of the Indictment was grounded.

11. Because said Indictment in its two Counts and each of said Counts fails to allege in the language of the statute, to-wit,—Section 398 of Title 18 U. S. C. A., or in language of similar import, the offenses attempted to be pleaded.

12. Because said Indictment in its two Counts and each of said Counts fails to plead sufficient facts so as to bring the matters alleged within the law and to inform this defendant with sufficient particularity and certainty as to the precise charge attempted to be made against her and fails to disclose to the defendant the necessary and proper facts relative to the claimed commission of the alleged offenses.

13. Because said Indictment in its Two Counts and each of said Counts contains mere conclusions and does not plead facts.

[fol. 40] 14. Because said Indictment in its two counts and each of said Counts is vague, indefinite and uncertain and does not allege sufficient facts or circumstances tending to identify the particular offenses attempted to be charged therein.

15. Because the Indictment in its two Counts and each of said Counts is not sufficiently informative, [spedific], definite and certain to satisfy constitutional requirements under the applicable portions of the 5th and 6th Amendments to the Constitution of the United States.

16. Because said Indictment in its two Counts and each of said Counts does not charge the commission of any crime against the laws of the United States and fails to set forth properly and with the requisite definiteness and particularity all of the essential elements of the crimes attempted to be charged under Section 398 of Title 18 U. S. C. A.

17. Because the United States of America has failed to prove by evidence the allegations of the Indictment in its two Counts and each of said Counts.

18. Because the proof offered by the United States of America, as to the two counts of the Indictment and each of said counts, is insufficient in law and is not of such proba-

tive force as to amount to proof of guilt by evidence beyond a reasonable doubt as required by the law.

19. Because as to each of the Counts of the Indictment the Government failed to prove upon the trial of this case, by evidence beyond a reasonable —, the requisite and necessary criminal intent as required by Section 398 of Title 18 U. S. C. A., the law upon which this prosecution was grounded.

20. Because the Trial Court erred in denying the witness Doris McMahon her Constitutional right not to be compelled to give incriminating evidence against herself and compelled her to give incriminatory answers to questions propounded to her by Emmet L. Murphy, Assistant United States Attorney, which questions related to the alleged interstate transportation and as to acts of prostitution before and after said transportation.

[fol. 41] 21. Because the Court and the Assistant United States Attorney failed to advise the witness Margaret Smith of her Constitutional right relating to self-incrimination.

22. That the verdict of the Jury is contrary to the law, contrary to the evidence and not sustained by the evidence.

23. That the judgment and sentence of the Court is contrary to the law, contrary to the evidence and not sustained by the evidence.

24. Because the Court erred in overruling the Motion for a directed verdict of not guilty made and filed at the conclusion of the evidence in this case and after both sides had rested their respective cases.

25. Because there was a fatal variance between the allegations contained in the Indictment, in its two counts and each of said counts, and the proof offered by the Government in support thereof in that the transportation alleged in both counts of the Indictment were from Salt Lake City, Utah, to Grand Island, Nebraska, whereas the evidence showed a circle vacation trip by defendant's automobile, each party paying their own expenses, from Grand Island, Nebraska, through several states and then to Salt Lake City, Utah, and then back to Grand Island, Nebraska, there being no proof of any prostitution having taken place dur-

ing said circle vacation trip and the only prostitution proved was prostitution before leaving Grand Island, Nebraska, and after returning there. That the alleged transportation of the two women in "interstate commerce" was not that defined by Section 397 of Title 18 U. S. C. A. of that denounced by Section 398 of Title 18 U. S. C. A.

26. Because only one verdict was submitted by the Trial Court to the Jury, instead of four possible verdicts and in the two verdicts submitted to the jury the word guilty appeared with blank lines before the word, making it necessary for the jury to write in the word "not" before the word guilty, which was highly prejudicial to the defendant.

27. Because the Government failed to rebut the legal presumption that your defendant and appellant herein, if a [fol. 42] crime was committed as charged, was acting under the duress of her husband, the defendant and appellant, Hans Pete Mortensen.

Wherefore, the defendant, Lorraine Mortensen, prays that the judgment and sentence of the United States District Court for the District of Nebraska, Grand Island Division be reversed, and that the said United States District Court for the District of Nebraska, Grand Island Division, be directed to dismiss the Indictment in its two counts, and each of said Counts, against said defendant and that the said defendant be discharged.

Lorraine Mortensen, by Eugene D. O'Sullivan, One of Her Attorneys.

IN UNITED STATES DISTRICT COURT

APPLICATION FOR LEAVE OF COURT FOR EXTENSION OF TIME IN WHICH TO PROCURE BILL OF EXCEPTIONS AND SETTLE SAME —Filed February 27, 1943

Comes now the defendants, by Thomas W. Lanigan, one of their attorneys, and requests the Court for an Order granting defendants, and each of them, leave of Court to have an extension of time in which to secure, serve, settle and file a Bill of Exceptions in this case as to each of said defendants, and shows to the Court that said testimony as taken upon the trial by the Court Reporter has not been

written up and delivered to counsel, and therefore counsel could not abstract same and have it in Court to be settled by the Court at this time, and within thirty days from the taking of the appeal therein.

Dated: February 27, 1943.

Hans Pete Mortensen, Lorraine Mortensen, by Thomas W. Lanigan, One of Their Attorneys.

IN UNITED STATES DISTRICT COURT

ORDER DENYING APPLICATION FOR BILL OF EXCEPTION—Filed February 27, 1943

Now on this 27th day of February, A. D., 1943, this matter came on for hearing upon the application this day filed [fol. 43] herein by defendants praying for an extension of time within which to prepare, present and settle the Bill of Exceptions, and more than thirty days having now elapsed since the taking of the appeal herein, and no Bill of Exceptions having been presented or settled herein, and no further time for presenting or settling said Bill of Exceptions having been fixed by the Court within said period of thirty days,

It Is Ordered that no Bill of Exceptions shall be allowed or settled herein, and said application is hereby denied.

J. A. Donohoe, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER AS TO MATTERS TO BE CONTAINED IN TRANSCRIPT ON APPEAL—Filed February 27, 1943

Now on this 27th day of February, A. D., 1943, this matter came on for hearing pursuant to the order and notice herein on February 23, 1943, and said hearing having been continued from February 26, 1943, to this date, the United States of America being represented by Emmet L. Murphy, Assistant United States Attorney, and the defendants being represented by Thomas W. Lanigan and William P. Mullen of Grand Island, Nebraska, and Eugene D. O'Sullivan of Omaha, Nebraska.

It Is Therefore Ordered And Directed by the Court that the transcript of the Clerk's record of the proceedings in this cause shall consist of the following items, pleadings and orders:

1. Indictment filed January 28, 1941.
2. Plea of Not Guilty by both defendants.
3. Plea in Abatement and Motion to Quash filed March 3, 1941.
4. Demurrer to Plea in Abatement and Motion to Quash filed March 17, 1941.
5. Motion to Withdraw Pleas of Not Guilty filed March 27, 1941, and orders thereon.

[fol. 44] 6. Offer to Produce Facts by Oral Testimony filed March 27, 1941.

7. Motion to Produce Testimony Presented to Grand Jury filed March 27, 1941.
8. Motion [—] Quash filed April 11, 1941.
9. Answer to Plea in Abatement and Motion to Quash filed April 16, 1941.
10. Journal Entry of April 16, 1941.
11. Order of January 13th, 1943, denying application to review ruling on Plea in Abatement, etc.
12. Trial Order of January 13th, 1943.
13. Trial Order of January 14th, 1943.
14. Verdicts of Jury.
15. Defendants' Instruction No. 1, which the Court refused.
16. Judgment and Commitment as to Hans Pete Mortensen January 15, 1943.
17. Judgment and Commitment as to Lorraine Mortensen, January 15, 1943.
18. Motion for New Trial, including exhibits, except affidavit of juror, filed January 15, 1943.
19. Application to Grant Bail and Fix Cost Bond on Appeal, filed January 15, 1943.
20. Order Overruling Motion for New Trial and Fixing Bail Bond on Appeal, January 15, 1943.
21. Bail and Cost Bonds of both defendants on appeal.
22. Notice of Appeal filed January 18, 1943.
23. Amended Notice of Appeal filed February 4, 1943.
24. Order and Notice filed February 23, 1943.
25. Assignment of Errors to be filed within ten days from this date.

26. Application for time in which to prepare, serve and settle Bill of Exceptions, and Order of Court denying same.

J. A. Donohoe, United States District Judge.

[fol. 45] In United States District Court

Supplemental Order as to Additional Matter to Be Contained in Transcript on Appeal—Filed March 3, 1943

It Is Hereby Ordered By The Court that the transcript and record of proceedings on appeal herein, in addition to the matters designated in the Order of this Court of February 27, 1943, shall also contain the Journal Entry thereafter made and entered herein on this 3rd day of March, 1943.

Dated at Omaha, Nebraska, this 3rd day of March, 1943.

J. A. Donohoe, United States District Judge.

In United States District Court

Journal Entry Pertaining to Written Communication Between Court and Counsel Relative to Order Directing Counsel to Appear in Regard to Preparation of Transcript on Appeal—Filed March 3, 1943

The Clerk of this Court having theretofore notified the Court, as provided in Rule VII of the Rules of Practice and Procedure in Criminal Cases, of the filing of Notice of Appeal of defendants herein, the Court, on January 22, 1943, addressed a letter of direction and inquiry to Thomas W. Lanigan and Wm. P. Mullen, Grand Island, Nebraska, Attorneys for the above named defendants, and which said letter is as follows:

"January 22nd, 1943.

Thomas W. Lanigan, Wm. P. Mullen, Attorneys at Law,
Grand Island, Nebraska

In Re: United States vs. Hans Pete Mortensen and Lorraine Mortensen—No. 357 Criminal Grand Island Division

Gentlemen:

The Clerk of the Court, in keeping with the requirements of Rule 7 of the Rules of Criminal Procedure, has notified me of the filing of your Notice of Appeal.

[fol. 46] Under this rule, it is now the duty of the Court to at once direct the appellant, or his attorney, and the United States Attorney, to appear before me, and I am required to give such directions as may be approved with respect to the preparation of the record of appeal.

These directions may be given at any place which I may designate. I therefore designate the Chambers of the Court here in Omaha.

I hesitate to fix the time without first consulting you. I therefore wish you would kindly advise when you will be ready for this meeting. I assume you will want to have a transcript of the evidence before coming down, and also a transcript of the instructions to the jury. Otherwise we would hardly be in a position to accomplish very much in the way of directions.

Under the rule, the meeting must be prompt, and I therefore wish that you would advise me what time will best suit your convenience, and I will set the matter accordingly and advise the United States Attorney.

Very truly yours, J. A. Donohoe, United States District Judge."

JAD:H*

Thereafter, on January 27, 1943, the Court received a communication from the said Thomas W. Lanigan as follows:

"Thomas W. Lanigan
Attorney and Counselor at Law
Central Building
Grand Island, Nebr.

January 26, 1943.

Honorable James A. Donohoe, United States District Judge,
Post Office Building, Omaha, Nebraska

In Re: United States vs. Hans Pete Mortensen and Lorraine Mortensen—No. 357 Criminal—Grand Island Division

DEAR MR. DONOHOE:

After receiving your letter of January 22, I immediately got in touch with the Court Reporter, O. A. Abbott and [fol. 47] advised him of the contents of your letter. He said he would start to work on the transcript immediately, but did not know what date he would be able to get it out.

I have sent for a copy of the rules but they have not as yet arrived, possibly you could advise me how many days the appellant has to have the Transcript of the evidence and pleadings on file in the Circuit Court.

If you set a day and the Court Reporter would not have it completed, I was thinking that it might be possible, he could come down and read the evidence from his notes. I would suggest that you set a date, and if, for any good reasons, we could not be there on that particular date, I could get in touch with you by wire or otherwise. I presume you would want to give the Court Reporter at least 30 days to see if he could get it out.

Yours very truly, Tom Lanigan, Thomas W. Lanigan.

TWL:lp

P. S. I think Gene O'Sullivan will be associated with me in the appeal—"

And thereafter, on February 1, 1943, a further communication was addressed to the said Thomas W. Lanigan, under direction of this Court, and which said letter is as follows:

"February 1st, 1943.

Thomas W. Lanigan, Attorney at Law, Central Building, Grand Island, Nebraska

In Re: United States vs. Hans Pete Mortensen and Lorraine Mortensen—No. 357 Crim.

DEAR MR. LANIGAN:

Your letter of the 26th received. Judge Donohoe is in the hospital with a bad cold, but is expected to return to the office within a few days.

I presume you have by this time received a copy of the rules of the United States Circuit Court of Appeals for the [fol. 48] Eighth Circuit, which rules became effective May 31, 1942.

If you do not have these as yet, then you might refer to the Rules of Criminal Procedure following Section 688, Title 18, U. S. C. A. Your attention is particularly directed at this time to rules 7 and 9 of the Rules above mentioned.

With best regards, I am

Very sincerely yours, Mae D. Hammond, Secretary."

H.

Thereafter, on February 23, 1943, no further communication having been received from the said Attorneys for defendants, the Order of February 23, 1943, under Rule VII of said Rules of Practice and Procedure in Criminal Cases was entered and filed herein.

J. A. Donohoe, United States District Judge.

In United States District Court

Application of Defendants to Have Certain Instruction Requested by Defendants Included in Transcript on Appeal—Filed March 16, 1943

Comes now, Hans Pete Mortensen and Lorraine Mortensen, and each of them, by Eugene D. O'Sullivan, one of their attorneys, and move the Court to enlarge the Order of February 27th, 1943, and Supplement the Transcript of the Record on Appeal by permitting them, the said defendants, and each of them, to have the following Instruction which was requested by the Defendants, and each of them, included in the Transcript of the Record on Appeal in the above entitled cases.

"If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska, and that the final destination was Grand Island, Nebraska, and that the states of Colorado, Wyoming, and Utah, were incidentally gone through, you are instructed that the White [fol. 49] Slave Traffic Act specifically provides that the words "interstate commerce", as used in the act shall "include transportation from one state * * * to another state". This definition necessarily excludes, by implication, transportation from one point in a state to the same point within the same state and if you so find then you shall bring in a verdict of not guilty as to both Defendants on each count of the indictment."

Dated at Omaha, Nebraska, March 16th, 1943.

Hans Pete Mortensen and Lorraine Mortensen, by Eugene D. O'Sullivan, One of Their Attorneys.

In United States District Court

Order Denying Application to Enlarge Order of February 27th, 1943, and Supplementing Transcript of Record on Appeal—Filed March 17, 1943

Now on this 17th day of March, 1943, the matter of the defendant's Application to Supplement the Transcript of the Record on Appeal in this case and enlarge the previous order of the Court relating to the transcript of the Record on Appeal dated February 27th, 1943, came on for hearing before the Court, and the Court having heard and considered same and being fully advised in the premises finds that the request as prayed for should not be granted by the Court because there was no Bill of Exceptions in this case and the Instructions given are not before the reviewing Court so as to determine whether or not a like instruction to that requested if proper was given by the Court.

It Is Therefore Considered, Ordered And Adjudged by the Court that defendant's Application be and the same is hereby denied. Exception allowed each defendant.

By the Court: J. A. Donohoe, Judge.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

In United States Circuit Court of Appeals, Eighth Circuit

No. 12,531

Hans Pete Mortensen and Lorraine Mortensen, Appellants,

vs.

The United States of America, Appellee

Appeal from the District Court of the United States for the District of Nebraska

Order Denying Application of Appellants for Right to Have Bill of Exceptions, and for Additional Time to Prepare, Serve and Settle Same, etc.—March 24, 1943

This matter comes before the Court upon an application "for right to have a bill of exceptions and for additional

[fol. 51] time to prepare, serve, settle and file same," upon the attached affidavits of Thomas W. Lanigan and O. A. Abbott with exhibits attached to the affidavit of Mr. Lanigan, and upon the objection to such application of appellants (filed by appellee). Appellants were represented in oral argument by Mr. Eugene D. O'Sullivan and appellee by Mr. Emmet L. Murphy, Assistant United States Attorney, and the Court being advised,

It is Ordered that said application be and is hereby denied.

March 24, 1943.

[fol. 52] Appearances of counsel, omitted in printing.

[fol. 53] In United States Circuit Court of Appeals, Eighth Circuit

No. 12531. Criminal

Hans Pete Mortensen and Lorraine Mortensen, Appellants,

vs.

The United States of America, Appellee

Notice and Application of Appellants for Right to Have Bill of Exceptions and for Additional Time to Prepare and File Same, et al.—Filed March 18, 1943

Notice

To the Appellee, The United States of America, Represented in This Action by Joseph T. Votava, United States Attorney, and Emmet L. Murphy, Assistant United States Attorney, Both of Said Counsel Being Attorneys for the District of Nebraska:

You Are Hereby Notified that Hans Pete Mortensen and Lorraine Mortensen, Appellants herein, through Eugene D. O'Sullivan, one of their attorneys, has applied to the Circuit Court of Appeals for the Eighth Judicial Circuit for an order of said Court granting said appellants, and each of them, 40 days additional time in which to prepare, serve, settle and file a Bill of Exceptions in this case, a

copy of which Application together with a copy of the Affidavit of Thomas W. Lanigan which has nine (9) exhibits attached thereto, and the Affidavit of O. A. Abbott, Shorthand Court Reporter, who reported the trial of said appellants case in the District Court is herewith handed to you.

That the appellants will call said Application with the supporting affidavits and exhibits aforementioned, up for hearing before the Circuit Court of Appeals in and for the Eighth Circuit sitting at Kansas City, Missouri, on the 22 day of March, 1943, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard which said date is more than five (5) days from the service of this notice.

[fol. 54] Dated at Omaha, Nebraska, this 12 day of March, 1943.

Hans Pete Mortensen and Lorraine Mortensen, By Eugene D. O'Sullivan, One of Their Attorneys.

Receipt of a copy of this Notice and copies of the aforementioned Application and the Affidavits of Thomas W. Lanigan, containing nine (9) exhibits, and the Affidavit of O. A. Abbott, are acknowledged by us this 16th day of March, 1943, and service of this Notice and said affidavits and exhibits upon the appellee United States of America is hereby acknowledged the day and date above named.

United States of America, Appellee, By Joseph T. Votava, per Emmet L. Murphy, Assistant United States Attorney.

Application

Comes now Hans Pete Mortensen and Lorraine Mortensen, and each of them, by Eugene D. O'Sullivan, one of their attorneys, and moves the Court for an order granting said Appellants and each of them the right to have a Bill of Exceptions in this case and for Forty (40) day- additional time from the entry of any such order by this Court in whi h to prepare, serve, settle and file said Bill of Exceptions in this case, and in connection with and as a part of this Application the appellants show to the Court that no immediate compliance by the Court or counsel for the defendants was had with reference to Rule Seven (7) after the Notice of Appeal was filed with the

Clerk, and the Trial Court did not at once direct the respective attorneys to appear before him and give them appropriate directions with respect to the preparation of the record on appeal, etc., and the 30 day period in which to settle the Bill of Exceptions contemplated by Rule Nine (9) of the Rules Relating to Appeals in criminal cases had expired before counsel for defendants were able to [fol. 55] secure from the shorthand reporter, who reported the trial of appellants in the District Court for the District of Nebraska, Grand Island Division, a transcript of the testimony and the trial proceedings and that through oversight, inadvertence and mistake, the then counsel for the appellants, not being able to prepare said Bill of Exceptions so that it could be settled within 30 days failed to secure an extension of time from the Trial Court within said 30 day period and hence the application for additional time in which to prepare, serve, settle and file said Bill of Exceptions was denied by the Trial Court and said appellants will not have a Bill of Exceptions for the consideration of this Court on appeal unless the order herein prayed for is granted.

That in Counsel's opinion it is necessary in order that appellants may make a proper presentation to this Court of this appeal that said appellants be permitted by this Court to have said 40 days additional time in which to have their Bill of Exceptions settled and filed.

That this Application is not made for the purpose of delay, but for the purpose of presenting to this Court an abstract of the facts produced upon the trial and thus obtaining a just decision upon this appeal.

That attached hereto and made a part hereof are the affidavits of Attorney Thomas W. Lanigan and Court Reporter O. A. Abbott and that said Attorney Lanigan's Affidavit has attached thereto Nine (9) Exhibits which are true and correct and which are necessary in counsel's opinion to a proper presentation of this application to this Court.

Hans Pete Mortensen and Lorraine Mortensen, By
Eugene D. O'Sullivan, One of Their Attorneys.

[fol. 56] AFFIDAVIT OF THOMAS W. LANIGAN IN SUPPORT OF APPLICATION

UNITED STATES OF AMERICA,
State of Nebraska,
County of Hall, ss:

I, Thomas W. Lanigan, being first duly sworn upon my oath depose and say, that I am now and for a number of years last past have been a duly licensed and practicing attorney; that my law office is now, and for several years last past, has been located in Grand Island, Hall County, Nebraska; that on and prior to the month of January, 1943 an attorney named William P. Mullen of Grand Island, Nebraska, and I were employed as attorneys to represent the appellants Hans Pete Mortensen and Lorraine Mortensen who were arrested and later tried in the Grand Island Division of the United States Court at Grand Island, Nebraska, for a violation of the United States White Slave Law, said case being known on the Court Docket of the Clerk of said Court of the Grand Island Division of Nebraska as No. 337 Criminal; that a trial of said case on a joint indictment containing two counts was had in the District Court at Grand Island, Nebraska, on January 13th and 14th, 1943, and said trial resulted in a verdict of guilty as to both defendants on both counts of the indictment; that Motions for new Trials were filed, submitted and overruled by the Court on the 15th day of January, 1943 and that thereafter on January 15th, 1943, Hans Pete Mortensen was sentenced to imprisonment for 3 years on each of the two counts of the Indictment both of said sentences to run concurrently, and fined $500.00 on each of said counts, and Lorraine Mortensen was sentenced to 3 years imprisonment on each of said two counts said sentences to run concurrently; that thereafter and on January 18th, 1943 a Notice of Appeal was filed which was within 5 days after sentence and the defendants were permitted by the Court to give supersedeas and thereafter they furnished bail and were released by the Court during the pendency of the contemplated appeals; that after said defendants were sentenced and on January 22, 1943, I ordered from the Court Reporter, O. A. Abbott, who reported all of the testimony and trial proceedings a transcript of same and a cash deposit was made with said O. A. Abbott and I

[fol. 57] obligated myself to pay any further amount due and owing above said deposit; that said Court Reporter accepted said employment and I urged him to write same up at the earliest possible date so that I could abstract same and have same ready to serve, settle and file, as the Bill of Exception in this appeal; that I made many efforts to secure said testimony and trial proceedings from said O. A. Abbott, but he claimed that due to the press of other business he could not write same up forthwith from his shorthand notes; that I endeavored to exercise due diligence in the premises and if I had been able to secure the transcript of the evidence and trial proceedings I would have been able to have had a Bill of Exceptions served, settled and filed herein within the 30 days provided for by said rules; that I am attaching hereto and making a part of this Affidavit as fully and completely as if herein set forth the following Exhibits: (a) Exhibit 1, which is a letter to me from O. A. Abbott, dated January 25th, 1943. (b) Exhibit 2, which is a letter from O. A. Abbott to me dated March 3rd, 1943. (c) Exhibit 3, which is a copy of a letter to me from Hon. J. A. Donohoe, the Trial Judge, dated January 22nd., 1943. (d) Exhibit 4, which is a copy of a letter which I sent to District Judge James A. Donohoe, dated January 26th, 1943. (e) Exhibit 5, which is a letter from Mae D. Hammond in reply to my letter to District Judge James A. Donohoe, dated February 1st., 1943. (f) Exhibit 6, which is a letter from the Deputy United States Clerk at Grand Island, Nebraska to me dated February 24th, 1943. (g) Exhibit 7, which is a copy of an Order and Notice directed to counsel by District Judge James A. Donohoe dated February 23rd., 1943. (h) Exhibit 8, which is a copy of an Application for leave of Court for Extension of time in which to procure a Bill of Exceptions and file same, dated February 27th, 1943. (i) Exhibit 9, which is a copy of an Order entered by District Judge James A. Donohoe denying the Application for a Bill of Exceptions in this case, dated February 27th, 1943; that heretofore I have never appeared as counsel in any criminal case appealed from the District Court of the United States to the Circuit Court of Appeals under the new rules and was not familiar with the present rules of procedure governing said appeals; that I did not have a copy of the rules referred to in Exhibits 3 and 5 and over-[fol. 58] looked the fact that if the Bill of Exceptions was

not settled within 30 days, as provided for by said Rule 9 of the rules pertaining to criminal appeals, then an extension of time had to be secured from the Trial Court within said 30 day period, and never learned about said matter until I appeared before District Judge James A. Donohoe on February 26th, 1943, pursuant to the Order and Notice designated herein as Exhibit 7, which was not within the 30 day period; that no immediate action by the Trial Court and counsel for the defendant was had with reference to complying with Rule Seven (7) after the Notice of Appeal was filed with the Clerk of the Court and the Trial Court did not at once direct the respective attorneys to appear before him at some designated place within the judicial district and gave such directions as were appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings; that although your affiant was unfamiliar with this rule he was laboring under the impression that he would be advised by the Trial Judge before any default occurred which would deny appellants their rights to a Bill of Exceptions and waited for orders to appear before said Trial Judge and discuss and agree upon what should go into said Bill of Exceptions; that his letters, to the Trial Court hereto attached evidence that such was affiants understanding of said matter; that my clients have been to great expense in instituting this appeal and said appeal is meritorious as is evidence by the fact that the Trial Judge James A. Donohoe granted the defendants bail; that whether or not a crime was committed as denounced by Section 398 of Title 18 U. S. C. A., known as the White Slave Law is to be determined from the evidence introduced upon the trial; that the transcript which may be prepared under Rule 8 of the rules relating to criminal appeals may not definitely show in a satisfactory way the facts upon which the prosecution and conviction was predicated and an appeal thereon may be futile, because of the inability to substantiate or discern the facts from the transcript; that the alleged transportation as the evidence disclosed was that the defendants and the two women alleged to be "victims" all resided in Grand Island, Nebraska, and said two women were employed at the room-
[fol. 59] ing house of the defendants and did carry on prostitution therein before the trip commenced; that the defendants planned to visit the mother of the defendant Lor-

raine Mortensen who lived in Salt Lake City, Utah and also planned on vacationing in Yellowstone National Park; that the two women desired to accompany them and agreed that they would pay their own expenses if the defendants would allow them to accompany them to see the mountains and western scenery; that the only purpose and intent of the trip was sightseeing and visiting the defendant Lorraine Mortensen's parents, and amounted to a circle trip commencing at Grand Island, Nebraska and going through several western states by Salt Lake City and returning to Grand Island, the place of commencing said trip; that nothing was said on the trip about the two women returning to Grand Island or of continuing to be employed by the defendants at Grand Island or any other place and that they were at no time induced or enticed to return to Nebraska for the purpose of prostitution and debauchery and were free to come and go as they pleased without restraint on the part of the defendants; that no acts of prostitution or solicitation occurred on said trip and each of said woman paid their own expenses; that after returning to Grand Island, Nebraska, the said women renewed their prostitution in the defendant's rooming house; that the Indictment in order to charge the crime of White Slavery ignored the fact that the starting point of the trip was Grand Island, Nebraska, and picked up these parties at Salt Lake City, Utah, and charged an unlawful transportation therefrom to Grand Island, Nebraska, which Salt Lake City, Utah, was an intermediate point on the Circuit vacation trip and was not the starting point of said transportation, which if alleged correctly would have been Grand Island, Nebraska; that the ultimate destination would also be Grand Island, Nebraska; that there was no evidence showing the formulation of any intent by the defendants or either of them to commit an offense at Salt Lake City, Utah or any other place on said circle tour; that the testimony also showed that the two defendants were husband and wife and that the husband dictated and controlled the course of said trip and that the wife and two other women merely rode along with him and there was no evidence offered by the United States of America rebutting the presumption that if a [fol. 60] crime was shown to have been committed that the wife was not acting under the duress of her husband; that there is authority in the case of United States v. Wilson, 266 Fed. 712 which sustaines the contention that no crimes

were committed and there are no reported cases holding to the contrary; that if these defendants are allowed 40 days additional time as requested in their Application to this Court in which to prepare, serve, settle and file their Bill of Exceptions same will be in the interests of justice and will enable the Court to have all of the facts before it upon the hearing of this appeal so that a true and correct decision of this appeal may be had.

Thomas W. Lanigan.

Subscribed in my presence and sworn to before me this 11th day of March, 1943. Wm. P. Mullen, Notary Public. My commission expires May 4, 1943. (Notary Seal.)

EXHIBIT 1

DISTRICT COURT, ELEVENTH JUDICIAL DISTRICT OF NEBRASKA

E. G. Kroger, Judge, Grand Island, Nebraska

Arthur H. Bass, Reporter

January 25, 1943.

Mr. Thomas W. Lanigan, 202½ North Locust Street, City

DEAR MR. LANIGAN:

Re: UNITED STATES OF AMERICA

v.

MORTENSENS

I beg to acknowledge receipt of your telephone call of Friday, January 22nd, ordering transcript of proceedings [fol. 61] and bill of exceptions in the above case and I have entered the order and will make a start in a few days.

As to how long it will take to get this out depends on court work but can get it out in plenty of time, that is within sixty days after the overruling of the motion for a new trial.

As to what the cost will be, it is impossible to state at this time because I do not know for certain what you want

in the way of the opening statements and arguments. I am [assuming] that you will want the opening statement of Mr. Murphy as you made at least three objections thereto and may want your opening statement because his is in.

In as much as I will have to hire most all of this typed, I wish you or have your clients send me $100.00 and we can decide later just what is to be included. In the meantime I will go right ahead and make one original and one carbon copy of the proceedings and will include the opening statement of Mr. Murphy, with your objections and the courts ruling in full, and then I will skip your opening statement and go to the testimony and proceed to get that out and then I will skip the arguments and go to the Instructions of the court and you can advise me later if you want any of the part I am tentatively omitting.

This is not a long record but takes time to get it out.

This also covers the matters of our phone conversation of this morning.

Yours truly, O. A. Abbott, Court House, Grand Island, Nebraska.

[fol. 62] EXHIBIT 2

District Court
Eleventh Judicial District of Nebraska
E. G. Kroger, Judge
Grand Island, Nebraska

March 3, 1943

O. A. Abbott, Reporter

Mr. Eugene D. O'Sullivan,
636 Electric Building,
Omaha, Nebraska.

Re: United States v. Mortensens

I finished this morning, a complete transcript, in duplicate, of the testimony taken on the trial of the above entitled before Judge Donahue and a jury.

I took the same to the offices of T. W. Lanigan and W. P. Mullen and they instructed me to send it to you and am enclosing herewith one original copy and the last portion of the second copy, as they advised me you had the first part of the copy, and you can bind the portion you have with the balance enclosed.

This case was tried on January 13 and 14, 1943 and Mr. T. W. Lanigan ordered a transcript of the evidence on January 22, 1943 and shortly thereafter I started work on it. There were two exhibits offered in evidence and I wrote out the testimony down to the first exhibit and then went to the office of the Deputy Clerk of the U. S. Court here and asked for the file and exhibits and she advised me the same had all been sent to the Clerk in Omaha to prepare the record on appeal. I told her I must have the exhibits shortly; she said she would write for the file and I asked her to phone me when it was received. I continued to write out the record down to Exhibit 2 and then had to stop, as various items in Exhibit 2 were referred to. This was about three weeks ago that I requested the file and exhibits. Shortly after that, Mr. T. W. Lanigan saw me and said Judge Donahue had written him about fixing a time to settle [fol. 63] the record and if I did not have the transcript of the evidence completed at the time, he asked me if I could go down to Omaha and read to Judge Donahue what I had not extended and I told him I could, and so I continued to transcribe my notes, as above referred to, and knew that the file would not come back here until the hearing in Omaha.

A short time after Mr. Lanigan first advised me about the letter from Judge Donahue he said he told me that he had a letter from Miss Hammond, Secretary to Judge Donahue, that the Judge was sick, so knowing that they would need the file and exhibits when the hearing was on at Omaha and also knowing that I had almost finished the transcript and could easily do so within sixty days from the overruling of the motion for a new trial, I did not urge the return of the exhibits.

A hearing was had before Judge Donahue in Omaha on last Saturday and on the Tuesday following. I got to see the file and exhibits, which had just been returned from Omaha, and that day, March 2, and this morning I completed the transcribing of the evidence, and took same to Mr. Lanigan's and Mr. Mullen's office, as herein before set forth.

I understood I had sixty days to extend the testimony and if that is true, I still have about fourteen days left but would have finished it much sooner if the exhibits had been available to me when I wanted them.

Please acknowledge receipt and oblige.

Very truly yours, O. A. Abbott.

EXHIBIT 3

United States District Court
District of Nebraska

Judges:
James A. Donohoe
Omaha, Nebraska
John W. Delehant
Lincoln, Nebraska

January 22nd, 1943

[fol. 64] Thomas W. Lanigan,
Wm. P. Mullen,
Attorneys at Law,
Grand Island, Nebraska.

In Re: United States v. Hans Pete Mortensen and Lorraine Mortensen—No. 357 Criminal Grand Island Division

Gentlemen:

The Clerk of the Court, in keeping with the requirements of Rule 7 of the Rules of Criminal Procedure, has notified me of the filing of your Notice of Appeal.

Under this rule, it is now the duty of the Court to at once direct the appellant, or his attorney, and the United States Attorney, to appear before me, and I am required to give such directions as may be approved with respect to the preparation of the record of appeal.

These directions may be given at any place which I may designate. I therefore designate the Chambers of the Court here in Omaha.

I hesitate to fix the time without first consulting you. I therefore wish you would kindly advise when you will be ready for this meeting. I assume you will want to have a transcript of the evidence before coming down, and also a transcript of the instructions to the jury. Otherwise we would hardly be in a position to accomplish very much in the way of directions.

Under the rule, the meeting must be prompt, and I therefore wish that you would advise me what time will best suit your convenience, and I will set the matter accordingly and advise the United States Attorney.

Very truly yours, J. A. Donohoe, United States District Judge.

JAD:H

[fol. 65] EXHIBIT 4

January 26, 1943

Honorable James A. Donohoe,
United States District Judge,
Post Office Building,
Omaha, Nebraska.

In Re: United States vs. Hans Pete Mortensen and Lorraine Mortensen—No. 357 Criminal Grand Island Division

Dear Mr. Donohoe:

After receiving your letter of January 22, I immediately got in touch with the Court Reporter, O. A. Abbott and advised him of the contents of your letter. He said he would start to work on the transcript immediately, but did not know what date he would be able to get it out.

I have sent for a copy of the rules but they have not as yet arrived, possibly you could advise me how many days the appellant has to have the Transcript of the evidence and pleadings on file in the Circuit Court.

If you set a day and the Court Reporter would not have it completed, I was thinking that it might be possible, he could come down and read the evidence from his notes. I would suggest that you set a date, and if, for any good reasons, we could not be there on that particular date, I could get in touch with you or otherwise I presume you would want to give the Court Reporter at least 30 days to see if he could get it out.

Yours very truly, Thomas W. Lanigan.

TWL:lp.

P. S. I think Gene O'Sullivan will be associated with me in the appeal—"

[fol. 66] EXHIBIT 5

United States District Court
District of Nebraska

Judges:
James A. Donohoe
Omaha, Nebraska
John W. Delehant
Lincoln, Nebraska

February 1st, 1943

Thomas W. Lanigan,
Attorney at Law,
Central Building,
Grand Island, Nebraska.

In Re: United States v. Hans Pete Mortensen and Lorraine Mortensen—No. 357 Crim.

Dear Mr. Lanigan:

Your letter of the 26th received. Judge Donohoe is in the hospital with a bad cold, but is expected to return to the office within a few days.

I presume you have by this time received a copy of the rules of the United States Circuit Court of Appeals for the Eighth Circuit, which rules became effective May 31, 1942.

If you do not have these as yet, then you might refer to the Rules of Criminal Procedure following Section 688, Title 18, U. S. C. A. Your attention is particularly directed at this time to rules 7 and 9 of the Rules above mentioned. With best regards, I am

Very sincerely yours, Mae D. Hammond, Secretary.

H.

[fol. 67] EXHIBIT 6

United States District Court
Office of the Clerk
District of Nebraska
Grand Island, Nebraska

February 24, 1943.

Mr. Thomas A. Lanigan, Attorney, Mr. William P. Mullen, Attorney, 202½ North Locust Street, Grand Island, Nebraska

GENTLEMEN:

Re: United States vs. Mortensen, etc. Criminal No. 357

Enclosed, you will find copy of Order and Notice in the above case.

Very truly yours, Emily Kalkowski, Deputy Clerk.

EK
enc.

cc Mary A. Mullen, Clerk
Omaha, Nebraska.

EXHIBIT 7

(Order of District Court for Appearance of Counsel for Directions in regard to preparation of Transcript on Appeal)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEBRASKA, GRAND ISLAND DIVISION

No. 357

UNITED STATES OF AMERICA, Plaintiff,

vs.

HANS PETE MORTENSEN and LORRAINE MORTENSEN, husband and wife, Defendants

Criminal

To the Honorable Joseph T. Votava, United States Attorney, and Emmet L. Murphy, Assistant United States Attorney for the District of Nebraska, and
To Thomas W. Lanigan and William P. Mullen, Attorneys for the Above Named Defendants:

[fol. 68] You, and each of you, are hereby notified and directed to appear before me at Chambers in the United

States District Court in the Post Office Building at Omaha, Nebraska, at 10:00 o'clock A. M., Friday, February 26, 1943, at which time such directions will be given as may be appropriate with respect to the preparation of the record on appeal herein, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings.

It Is Further Ordered that notice of this hearing shall be given to said above named Attorneys for Defendants by the Clerk of this Court by mailing a copy of this Notice and Order to said Defendants at Grand Island, Nebraska.

Dated at Omaha, Nebraska, this 23rd day of February, 1943.

J. A. Donohoe, United States District Judge.

Filed: Feb. 23, 1943. Mary A. Mullen, Clerk. By Emily Kalkowski, Deputy.

EXHIBIT 8

Application for Leave of Court for Extension of Time in Which to Procure Bill of Exceptions and Settle Same

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEBRASKA, GRAND ISLAND DIVISION

No. 357

UNITED STATES OF AMERICA, Plaintiff,

vs.

HANS PETE MORTENSEN and LORRAINE MORTENSEN, Defendants

Criminal

Comes now the defendants, by Thomas W. Lanigan, one of their attorneys, and requests the Court for an Order granting defendants, and each of them, leave of Court to have an extension of time in which to secure, serve, settle and file a Bill of Exceptions in this case as to each of said defendants, and shows to the Court that said testimony as taken upon the trial by the Court Reporter has not been written up and delivered to counsel, and therefore counsel

could not abstract same and have it in Court to be settled [fol. 69] by the Court at this time, and within thirty days from the taking of the appeal therein.

Dated: February 27, 1943.

Hans Pete Mortensen, Lorraine Mortensen, by Thomas W. Lanigan, One of Their Attorneys.

EXHIBIT 9

Order Denying Application for Bill of Exceptions

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEBRASKA, GRAND ISLAND DIVISION

No. 357

UNITED STATES OF AMERICA, Plaintiff,

vs.

HANS PETE MORTENSEN and LORRAINE MORTENSEN, Defendants

Criminal

Now on this 27th day of February, A. D., 1943, this matter came on for hearing upon the application this day filed herein by defendants praying for an extension of time within which to prepare, present and settle the Bill of Exceptions, and more than thirty days having now elapsed since the taking of the appeal herein, and no Bill of Exceptions having been presented or settled herein, and no further time for presenting or settling said Bill of Exceptions having been fixed by the Court within said period of thirty days,

It Is Ordered that no Bill of Exceptions shall be allowed or settled herein, and said application is hereby denied.

James A. Donohue, United States District Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 12531

HANS PETE MORTENSEN and LORRAINE MORTENSEN, Appellants

vs.

THE UNITED STATES OF AMERICA, Appellee

Criminal

AFFIDAVIT OF O. A. ABBOTT IN SUPPORT OF APPLICATION

I, O. A. Abbott, being first duly sworn upon my oath depose and say, that for many years I have been a citizen [fol. 70] and resident of Grand Island, Nebraska; that by occupation I am a Court Reporter and have followed said calling for many years; that I was engaged by the defendants above named and Thomas W. Lanigan and William P. Mullen, the attorneys who represented the said defendants, to report the evidence and all trial proceedings of the defendants when their case was heard in the United States District Court at Grand Island, on January 13th and 14th, 1943; that I reported all of said evidence and proceedings in said case; that after the defendants had been convicted, sentenced and released on bail I was employed to write up the evidence and that they might want all of the opening and closing statements and other proceedings besides the evidence and would advise me later, the date of said employment being about the 22nd of January, 1943; that shortly thereafter $50.00 was paid to me on account and I was willing to extend credit for any balance due and owing; that I began writing up said evidence and within a few days called on the Deputy Clerk of the United States Court at Grand Island for the exhibits and she told me that she had sent them and entire record to Omaha and I told her I must have said exhibits and she said she would write for the record and asked to have it returned from Omaha and within a very few days thereafter I saw Mr. Thomas W. Lanigan and he said he had a letter from Judge Donohue asking to have a date fixed to settle the record and I told Mr. Lanigan about asking for the exhibits and that I would have to stop getting out the testimony until I could get the exhibits, and Mr. Lanigan said that when a date is fixed and

if you haven't all the record out we can take you with us to Omaha and have you read what is not extended and I agree to go to Omaha, and then thereafter Mr. Lanigan advised me that he had a letter from Judge Donohue's secretary to the effect that he was in the hospital and Mr. Lanigan said that we will let you know when a date for hearing is fixed. I did extend said testimony down to the point where it was necessary for me to have the exhibits and then quit because I knew or felt sure the record would not be sent back until Judge Donohue was again at work and could hear them. A part of the record was delivered to Mr. Lanigan the last of February, by the Clerk when I was out of town, and a [fol. 71] hearing had in Omaha and then the record was sent back from Omaha, I believe on Saturday, and on Tuesday I had access to the exhibits and finished the transcript of the evidence within 24 hours thereafter and shipped the same by express to Mr. Eugene O'Sullivan; affiant further states that he could have completed and would have completed the transcription of the evidence much sooner than he did if he had had access to the exhibits, and failure to get out said evidence earlier was not due to any fault or neglect on my part and it was all completed within about forty days after being ordered and within about forty-eight days after sentence was imposed. That all of the evidence was shipped, as before stated to Mr. Eugene O'Sullivan, attorney for the appellants, and was shipped to him on Wednesday, March 3, 1943, and that the exhibits in said case were still in Omaha on February 27, 1943, for the hearing before Judge Donohue and affiant does not know the exact day they were returned to Grand Island; that I wrote letters to Mr. Thomas W. Lanigan about the same and signed them and they are the letters attached to the affidavit of Mr. Thomas W. Lanigan and that they are true and correct; affiant further states that he also wrote a letter to Eugene O'Sullivan at the time he sent said evidence and that the same was signed by me and is true and correct.

Dated at Grand Island, Nebraska this 11th day of March, 1943.

O. A. Abbott.

Subscribed in my presence and sworn to before me this 11th day of March, 1943. D. O. Beckmann, Clerk Dist. Court. (Seal.)

[File endorsement omitted.]

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS

OBJECTION OF APPELLEE TO APPLICATION FOR ADDITIONAL TIME TO PREPARE, SERVE, SETTLE AND FILE BILL OF EXCEPTIONS—Filed March 22, 1943

Comes now The United States of America, Appellee herein, by Emmet L. Murphy, Assistant United States Attorney for the District of Nebraska, and objects to the allowance of the Application for Right to Have a Bill of Exceptions and for Additional Time to Prepare, Serve, Settle and File the Same herein, for the following reasons:

1. That Appellants failed to procure to be settled and to file with the Clerk of the Trial Court a Bill of Exceptions within thirty days after taking the appeal herein on January 18, 1943.

2. That Appellants failed to apply to or secure from the Trial Judge further time within which to procure and settle such Bill of Exceptions within thirty days after the taking of the appeal herein on January 18, 1943.

3. That no sufficient cause is shown herein by Appellants for the failure of Appellants to have complied with the provisions of Rule IX of the rules of this Court, effective May 31, 1942. In this connection Appellee respectfully shows to the Court the following facts:

(a) That through the entire pendency of this action the Appellants were represented by able and experienced counsel, Thomas W. Lanigan and William P. Mullen, both residing in and engaged in the practice of law in the City of Grand Island, Nebraska. That since some time shortly subsequent to January 18, 1943, said Appellants have also been represented by Eugene D. O'Sullivan, an experienced and capable attorney residing in and engaged in the practice of law in the city of Omaha, Nebraska. That both Appellants were and ever since January 15, 1943, have been at liberty under bond. That Appellant, Lorraine Mortensen, prior to and ever since the trial of this cause, has resided in and been present in the said city of Grand Island, Nebraska, or at times, in the city of Omaha, Nebraska, and that both of said Appellants and all of their attorneys have been free at all times to consult together, and to take any and all action [fol. 73] necessary or desired in connection with any appeal of this cause.

(b) That as shown by Exhibit 3, attached to said Application of Appellants filed herein, Attorneys Thomas W. Lanigan and William P. Mullen were advised by the Trial Judge on January 22, 1943, three days after the taking of the appeal herein, of the Rules of Procedure, and that any delay thereafter in fixing a time and place for the hearing, provided for in Rule VII of said Rules of Procedure, was solely the result of the failure of Appellants or their said attorneys to advise the Trial Judge as to what date would be convenient for them for such hearing, as requested by the Trial Judge. That under date of February 1, 1943, by letter addressed to the said Thomas W. Lanigan at Grand Island, Nebraska, by Mae D. Hammond, Secretary to the Trial Judge, a copy of which said letter appears as Exhibit 5 attached to said Appellants' Application filed herein, and which letter was written under direction of the Trial Judge, and was received by said Attorney Thomas W. Lanigan some 15 days prior to the expiration of said thirty-day period, the attention of said attorney for Appellants was specifically directed to the said Rules of Procedure and particularly to Rule VII and IX thereof, and to the particular place in the United States Code Annotated, where said rules are found.

(c) That as shown by Exhibit 1 attached to Appellants' Application filed herein, counsel for Appellants was advised by the court reporter, O. A. Abbott, on January 25, 1943, and long before the expiration of said period of thirty days, mentioned in said Rule IX, that said reporter was also attending to other business and only assured said attorney for Appellants of his ability to prepare a transcript of the evidence within sixty days thereafter, and that Appellants and their counsel were thereby placed upon notice within seven days after the taking of the appeal herein that said transcript of the evidence would not be prepared by the said reporter within said period of thirty days after the taking of said appeal. In this connection Appellee further shows to the Court that the trial of this cause consumed only approximately 1½ days, and by the exercise of ordinary diligence said transcript of the evidence could easily [fol. 74] have been written up and Bill of Exceptions presented herein, all within said period of thirty days after the taking of the appeal, and in any event, by the exercise of any diligence, the question of whether or not additional

time might be necessary and might be granted, could easily have been presented to the Trial Judge all within said thirty-day period. In this connection Appellee further shows to the Court that as disclosed by the Affidavit of said O. A. Abbott, attached to said Application of Appellants filed herein, the failure of Appellants to comply with the provisions of said Rule IX was not in any manner the result of any lack of funds, nor the lack of any financial ability of Appellants to secure and present a Bill of Exceptions.

(d) That as shown by Exhibit 1 attached hereto, the exhibits offered and received at the trial of this cause were at all times available to Appellants and their attorneys, for use in preparing such Bill of Exceptions, and that failure to prepare and present said Bill of Exceptions was in nowise the result of any inability on the part of Appellants or their attorneys, or said court reporter, to have secured said exhibits at any time, upon the exercise of ordinary diligence.

Wherefore, Appellee, The United States of America, respectfully prays that the said Application of Appellants filed herein for right to have a Bill of Exceptions, and for additional time to prepare, serve, settle and file the same, be denied.

The United States of America, Appellee. By Emmet L. Murphy, Assistant United States Attorney for the District of Nebraska.

EXHIBIT 1.

(Affidavit of Mary A. Mullen, Clerk, U. S. District Court)

UNITED STATES OF AMERICA,
State of Nebraska,
Douglas County, ss:

MARY A. MULLEN, being first duly sworn on oath, deposes and says that she is the duly appointed, qualified and acting [fol. 75] Clerk of the United States District Court for the District of Nebraska, and was such Officer during the months of January, February and March, 1943, and for some time prior thereto.

That the exhibits offered and received in evidence at the trial of this cause were left and retained with the files of this Court in this cause. That upon the filing of the Notice of Appeal herein, it was necessary that said files be sent by the Deputy Clerk of the United States District Court at Grand Island, Nebraska, to the office of Affiant at Omaha, Nebraska, and to be retained in said office at Omaha, Nebraska, a portion of the time for the preparation of a transcript on appeal herein, and that said files, including said exhibits, were mailed to Omaha on January 20, 1943 and were thereupon retained in said Omaha office until January 27, 1943, when they were returned to said Grand Island office. That during said period of January 20 to January 27, 1943, said exhibits were available to Appellants or their attorneys and would have been furnished to said attorneys for Appellants upon any request therefor, either oral or written. That said exhibits were with said files in the office of the Deputy Clerk at Grand Island, for the period of January 27 to February 4, 1943, and during said period were readily available at Grand Island to attorneys for Appellants, whose office in Grand Island is located in a building just across the street from the Post Office, wherein the Deputy Clerk's office is located. That on February 4, 1943, said files, including said exhibits, were mailed to the Omaha office and were retained in the Omaha office until February 12, 1943, when they were returned to the Grand Island office, and said files and exhibits remained thereafter in the said Grand Island office to and until February 25, 1943. That during all of said period said exhibits were readily available to Appellants or their attorneys, or said court reporter, upon any request, either oral or written, and that Affiant received no request from Appellants or their attorneys, or said court reporter, for said exhibits during any of the period of time hereinabove in this Affidavit mentioned.

Further Affiant sayeth not.

Mary A. Mullen.

[fol. 76] Subscribed in my presence and sworn to before me this 19th day of March, 1943. Claire Henderson, Notary Public. (Notarial Seal.)

[File endorsement omitted.]

[fol. 77] In United States Circuit Court of Appeals

Order Denying Application of Appellants for Right to Have Bill of Exceptions and for Additional Time to Prepare, Serve and Settle Same, etc.—March 24, 1943

This matter comes before the Court upon an application "for right to have a bill of exceptions and for additional time to prepare, serve, settle and file same," upon the attached affidavits of Thomas W. Lanigan and O. A. Abbott with exhibits attached to the affidavit of Mr. Lanigan, and upon the objection to such application of appellants (filed by appellee). Appellants were represented in oral argument by Mr. Eugene D. O'Sullivan and appellee by Mr. Emmet L. Murphy, Assistant United States Attorney, and the Court being advised,

It is Ordered that said application be and is hereby denied.

March 24, 1943.

[fol. 78] In United States Circuit Court of Appeals

Order of Submission—September 8, 1943

This cause having been called for hearing in its regular order, argument was commenced by Mr. Eugene D. O'Sullivan for appellants, continued by Mr. Emmet L. Murphy, Assistant United States Attorney, for appellee, and concluded by Mr. Eugene D. O'Sullivan for appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 12,531

HANS PETE MORTENSEN and LORRAINE MORTENSEN, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the District of Nebraska

Mr. Eugene D. O'Sullivan (Mr. Thomas W. Lanigan and Mr. William P. Mullen with him on the brief) for Appellants.

Mr. Emmet L. Murphy, Assistant United States Attorney, (Mr. Joseph T. Votava, United States Attorney, Mr. Fred G. Hawxby and Mr. William H. Meier, Assistant United States Attorneys, with him on the brief) for Appellee.

Before Woodrough, Thomas and Johnsen, Circuit Judges

OPINION—November 23, 1943

JOHNSEN, Circuit Judge, delivered the opinion of the Court.

Appellants were convicted under the White Slave Traffic Act, 36 Stat. 825, 18 U. S. C. A. § 397 et seq., for transporting two girls from Salt Lake City, Utah, to Grand Island, Nebraska, for the purpose of prostitution and debauchery. [fol. 80] They contend that the transportation could not possibly constitute a violation of the Act, because it was merely part of "a circle vacation trip", made from Grand Island, Nebraska, to Yellowstone National Park and Salt Lake City, Utah, and return. They say—to quote the language of their brief—that "the transportation which took place was not transportation in interstate commerce within the intent or meaning of the law, i.e. transportation from a point in one state to a point in another state, but was a transportation from Grand Island, Nebraska, to Grand Island, Nebraska, and the touring through other states on the circle vacation trip was a mere incident to the through transporta-

tion and not transportation from one state to another—the transportation denounced by the law."

Appellants are mistaken as to the proper construction of the White Slave Traffic Act and its object. The Act is entitled "An act to further regulate interstate and foreign commerce by prohibiting the transportation therein for immoral purposes of women and girls, and for other purposes." Its first section, 18 U. S. C. A. § 397, defines "interstate commerce" for purposes of the Act as "transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia." Its second section, 18 U. S. C. A. § 398, provides that "Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, * * * shall be deemed guilty of a felony," etc. This section of the Act plainly was intended to prohibit anyone from bringing a woman or girl across any state line, or of having her so brought, for the purpose of prostitution, etc.—which the jury has found was appellants' intent here in returning the girls to Nebraska. Congress has made no distinction in the Act, such as appellants would have us draw, between the [fol. 81] crossing of a state line with an immoral purpose as a matter of a migrant destination and the crossing of a state line with such a purpose as part of some circle or return trip.[1] The statute entirely closes the doors of interstate commerce to any and all such transportation.

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[1] The evidence to show the claimed circular trip in the present case is not properly before us, because appellants failed to have a bill of exceptions settled in the district court within the necessary time, and their application for an extension subsequently made to this court was denied by another division of judges of the court. In view of the earnest contention made here that, if the evidence had been permitted to be produced in this court, it would show that appellants were not guilty of a violation of the White Slave Traffic Act, as a matter of law, because of the circular vacation trip involved, we allowed counsel for appellants to leave with us a purported transcript of the evidence, but without any filing thereof, in order that we might assure ourselves that no fundamental injustice had been done by

The return of the girls in the present case by automobile from Salt Lake City, Utah, to Grand Island, Nebraska, was therefore inarguably transportation in interstate commerce as defined in section 1 of the Act. With equal certainty, their return across intervening state lines, with the intent to have them re-enter the house of prostitution operated by appellants at Grand Island, Nebraska, was a transporting in interstate commerce "for the purpose of prostitution or debauchery", within the meaning of section 2 of the Act.

The reported decisions confirm this construction of the Act.[2] In *Burgess* v. *United States*, App. D. C., 294 F. 1002, [fol. 82] a conviction was upheld, where the defendant, who already had a wife, took a woman from Washington, D. C., to Alexandria, Virginia, in order to marry her, and re-

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the previous denial of an extension, and that we would not, because of the absence of a bill of exceptions, be affirming a conviction which was not properly an offense under the Act. Having reached the conclusion, as indicated in the opinion, that, under the statute, there is no possible merit in appellants' contention that the return portion of "a circular vacation trip", by which the girls were intended to be returned to appellants' house of prostitution in Grand Island, Nebraska, is not a violation of the Act, it is obvious that no different result would have been reached if a bill of exceptions had been before us, showing all the facts, and that no injustice could possibly therefore have been done appellants by the previous denial of their application for an extension. The clerk will accordingly be directed to return to appellants the tendered transcript of testimony, without any filing thereof.

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[2] We have not previously had occasion to consider the question here involved in relation to the White Slave Traffic Act, but we have analogously held, under a similar definition of interstate commerce in the National Motor Vehicle Theft Act, 18 U. S. C. A. § 408, in *Hughes* v. *United States*, 8 Cir., 4 F. 2d 387, certiorari denied 268 U. S. 692, 45 S. Ct. 511, 69 L. Ed. 1160, that the taking of a stolen automobile on a circular trip from Cloud Chief, Oklahoma, to Safford, Arizona, and back again was a transportation in interstate commerce "from" one state "to" another.

turned after the ceremony to the District of Columbia, where they cohabited. In *Corbett* v. *United States*, 9 Cir., 299 F. 27, the defendant was convicted of causing a woman to be transported for immoral purposes from Spokane, Washington, to Boise, Idaho, where the transportation was merely a return by the woman from a visit made to some of her children, who were ill in Spokane. Defendant and the woman had been illicitly cohabiting in Boise before the trip was made; it was intended that the woman should simply make a visit to Spokane and should return; defendant paid the expenses of the trip; and, after the woman's return to Boise, the parties resumed their cohabitation. The situation is epitomized in the second syllabus point of the case as follows: "That defendant paid for the transportation of a woman from the place they then were into another state, where she went alone, and return, with the intention that she should return, does not prevent the return transportation, if with the requisite intent, from being a violation of White Slave Traffic Act." In *United States* v. *Oriolo*, D. C. E. D. Pa., 49 F. Supp. 226, the defendant had taken a woman, who was working for him as a prostitute in Philadelphia, Pa., from that city to Atlantic City, New Jersey, for a day's outing, with the intention that she should resume her prostitution on their return to Philadelphia. He was indicted under the Act for transporting the woman back from Atlantic City to Philadelphia. He contended, as do appellants here, that the whole trip was a mere "unitary circular journey", and that it was therefore not a transportation from one state to another within the meaning and intent of the Act. The court held that the return trip from Atlantic City to Philadelphia was clearly transportation that was prohibited by the terms of the statute and that the defendant therefore was guilty of a violation of the Act.

[fol. 83] As opposed to these decisions, we have been able to find only one case, *United States* v. *Wilson*, D. C. E. D. Tenn., 266 F. 712, and it is on this case that appellants place their reliance. There, the transportation of a woman, for immoral purposes, from Nashville, Tennessee, through a part of Alabama, to Chattanooga, Tennessee, was held not to be a violation of the Act, on the ground that the passage through Alabama was "a mere incident of the through transportation" from one point in Tennessee to another in the same state. Factual distinctions between that case and

the case at bar could perhaps be drawn, but we prefer rather to express our disapprobation of the interpretation there made of interstate transportation under the White Slave Traffic Act.[3] We agree with the criticism of the Wilson case voiced in *United States* v. *Winkler*, D. C. W. D. Tex., 299 F. 832, 834, that "it seems to stand alone, without authority to sustain it, and out of harmony with all other cases upon the same subject."

The construction here made of the Act automatically disposes of other of appellants' assignments of error without the necessity of further discussion. Some objections have been made to the indictment which also need not be discussed, since they are sufficiently answered by other decisions. See *Pines* v. *United States*, 8 Cir., 123 F. 2d 825; *Ackley* v. *United States*, 8 Cir., 200 F. 217; *Troutman* v. *United States*, 10 Cir., 100 F. 2d 628; *Hughes* v. *United States*, 6 Cir., 114 F. 2d 285, 288; *Connors* v. *United States*, 158 U. S. 408, 15 S. Ct. 951, 39 L. Ed. 1033; also 18 U. S. C. A. § 556.

The judgment as to each appellant is affirmed.

[fol. 84] DISSENTING OPINION

WOODROUGH, Circuit Judge, dissenting:

I have been unable to concur in affirming the conviction of these appellants because I am not convinced that their act of taking the named young women in their automobile on the vacation trip through the mountains and back was criminal.

Recognizing, as the record requires, that the business of appellants' house in Grand Island, Nebraska, was carrying on prostitution, I think there is a fallacy in spelling a crime out of the act of taking the inmates away from their place of prostitution and stopping it for the two weeks period of vacation travel. In the Mann Act Congress has exercised its powers in the field of interstate commerce to

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[3] As we have indicated, under the definition of interstate commerce contained in the White Slave Traffic Act and the National Motor Vehicle Theft Act (see footnote 2, supra,) the crossing of any state line is transportation "from" one state "to" another.

prevent transportations in interstate commerce in furtherance of sexual immorality. I do not think its provisions contemplate, or can be extended to, transportations that are not in furtherance and have nothing to do with sexual immorality except to interrupt and stop its practice for a period. The law has been on the books a long time and none of the cases cited appears to me to lend support to the affirmance. *Wilson* v. *United States*, 266 F. 712, is to the contrary, so far as it is in point. But there the transportation may have been in furtherance of the immoral practices, and I do not rely on it. It seems obvious to me that aiding prostitutes to travel away from their foul environment for even a short vacation period is not evil conduct and that it was not the intent of the Act to make it criminal. Splitting the round trip up into two transportations, innocent while outward bound but criminal on the homeward lap, seems to me a mental operation that reflects ingenuity of the prosecutor rather than fair application of the Act to what the appellants did.

I can discern only one intent of all the parties to the trip, and that was to take a vacation. They went away with that intent and held to it till they got back. The penitentiary sentences imposed upon these appellants for doing that and nothing more seem to me erroneous.

[fol. 85] In United States Circuit Court of Appeals, Eighth Circuit, November Term, 1943

No. 12531

Hans Pete Mortensen and Lorraine Mortensen, Appellants,

vs.

United States of America

Appeal from the District Court of the United States for the District of Nebraska

Judgment—Filed November 23, 1943

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgments and sentences of

the said District Court, in this cause, be, and the same are hereby, affirmed without costs to either party in this Court.

And it is further ordered that the defendants in the Court below, Hans Pete Mortensen and Lorraine Mortensen, do surrender themselves to the custody of the United States Marshal for the District of Nebraska, in execution of the judgments and sentences imposed upon them, and each of them, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 23, 1943.

[fol. 86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

ORDER RECALLING AND STAYING MANDATE—Filed December 20, 1943

This matter comes before the Court on the application of appellants to recall the mandate of this Court pending their application for certiorari from the Supreme Court of the United States and the court being advised,

It is Ordered that the mandate heretofore issued in this case be recalled and held until January 2, 1944, at which time it shall be reissued to the District Court unless before that date there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

December 20, 1943.

[fol. 87½] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 31, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Eugene D. O'Sullivan, File No. 48,052, U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 559. Hans Pete Mortensen and Lorraine Mortensen, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed December 27, 1943. Term No. 559, O. T. 1943.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 27 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 559

HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

EUGENE D. O'SULLIVAN,
Of Omaha, Nebraska,

THOMAS W. LANIGAN,
Of Grand Island, Nebraska,

WILLIAM P. MULLIN,
Of Grand Island, Nebraska,
Counsel for Petitioners.

Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1943

—o—o—

No. .....

—o—o—

HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

—o—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

—o—o—

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Hans Pete Mortensen and Lorraine Mortensen, and each of them, respectfully pray that a Writ of Certiorari issue to review a decision of the Circuit Court of Appeals for the Eighth Circuit, rendered on November 23rd, 1943, at St. Louis, Missouri, and

affirming the conviction, by a divided Court, of your petitioners in the United States District Court for the District of Nebraska, Grand Island, Nebraska, Division, Honorable James A. Donohoe, United States District Judge, presiding.

SHORT STATEMENT OF THE CASE

These petitioners were indicted in the District Court, as aforesaid, on an indictment returned on January 28th, 1941, containing two counts of which Count 1 (R. 1 and 2) charged that the defendants on September 4th, 1943, did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting, in interstate commerce, from Salt Lake City, Utah, to Grand Island, Nebraska, a certain named woman, for the purpose of prostitution and debauchery and with the intent and purpose to induce, entice and compel said woman to give herself up to debauchery and to engage in immoral practices; and Count 2 (R. 2) charged them with an exactly similar offense, except that a different woman was named as the person so transported.

The petitioners filed a Plea in Abatement and Motion to Quash the Indictment (R. 3 to 6, incl., and R. 9); filed a written offer to prove certain facts (R. 7 and 8). The respondent demurred to these pleadings (R. 6 and 7), which demurrer was overruled (R. 11 and 12) and the Government was given leave to and did file an answer thereto in which was incorporated a demurrer (R. 10) and after hearings thereon these pleadings were overruled (R. 11), exceptions were taken thereto and allowed by the Court (R. 11).

The indictment was assailed by these pleadings on the grounds that same did not plead facts but pleaded conclusions, was duplicitous, inconsistent, vague, indefinite and uncertain, and was not sufficiently informative so as to satisfy the requirements of the 5th and 6th Amendments to the United States Constitution, by advising the petitioners of the nature and cause of the accusations made against them, and because each count of the Indictment embraced all of the ways, means and manners in which White Slavery could be committed under the law, all of said ways, means and manners being connected up by the pleader by substituting the conjunctive "and" for the disjunctive "or," used in the statute.

It was the contention of the petitioners, as disclosed by the foregoing pleadings and admitted by the Demurrers of the respondent, that the facts relating to interstate transportation did not bring this case within the purview of Sections 397 and 398 of 18 U. S. C. A., the Anti-White Slave Traffic Act, because the actual transportation of these two women was from a point in the State of Nebraska, to-wit, Grand Island, to the same point in the State of Nebraska, and that the transportation of the petitioners and these two women through other states was for the purpose and intention of taking a circle vacation tour, or trip, and it was not the intentional transportation denounced by the law, and that the respondent in order to make a case on paper had selected Salt Lake City, Utah, as the starting point of the transportation, which city was merely one of the cities which the parties had passed through on the circle vacation trip on their way back home.

In line with their theory of the case counsel for the petitioners requested and the Trial Court refused to give

the following instruction, to which refusal an exception was taken and allowed by the Court (R. 14):

> "If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska, and that the final destination was Grand Island, Nebraska, and the states of Colorado, Wyoming and Utah were incidently gone through, you are instructed that the White Slave Traffic Act specifically provides that the words 'interstate commerce' as used in the Act shall include transportation from one state to another state. This definition necessarily excludes by implication transportation from one point in a state to the same point within the same state, and if you so find, then you shall bring in a verdict of not guilty as to both defendants on each count of the indictment."

Thereafter pleas of not guilty were entered, a trial was had, and after all of the evidence had been submitted a written Motion to Dismiss was filed (R. 23 to 25, incl.), same was overruled, and upon argument and submission, the jury returned a verdict of guilty on both counts, and each of said parties received a sentence of 3 years imprisonment on each of the two counts of the Indictment, said sentences to run concurrently, and Hans Pete Mortensen was also sentenced to pay a fine of $500.00 on each of said two counts (R. 14 to 16).

Later a Motion for a New Trial was filed and overruled (R. 16 to 22, incl.), Notices of Appeals were filed (R. 30, 31), Bail and Cost Bonds were posted (R. 26 to 31, incl.).

Thereafter, pursuant to the provisions of Rule 7 of the Rules of Procedure in Criminal Cases promulgated by the Supreme Court, the Clerk notified the Trial Judge

of the filing of the Notices of Appeal, but the Trial Judge did not *at once* notify the respective attorneys to appear before him, so as to give directions to counsel with respect to making up the record on appeal, and said attorneys were never notified pursuant to the provisions of Rule 7 so to do until 2 days after the statutory 30-day period had expired and then the Trial Court denies the petitioners the right to a Bill of Exceptions, but permitted an appeal to be taken on the Transcript alone, pursuant to Rule 8 of the Rules promulgated by the Supreme Court. (R. 50, 51).

Thereafter application was made to the Circuit Court of Appeals for the Eighth Circuit to allow petitioners a Bill of Exceptions, and both a showing and counter showing was made, and after arguments of counsel were had the petitioners were again denied a Bill of Exceptions.

In petitioners' brief filed in the Circuit Court of Appeals the matter of the denial of a Bill of Exceptions to them was again urged as error and this matter was argued to the Court, but same was to no avail.

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STATEMENT OF MATTERS INVOLVED AND THE GROUNDS RELIED UPON FOR GRANTING OF WRIT OF CERTIORARI

The discretionary power of this Court to grant a writ of certiorari is invoked on the following grounds:

First. Because the decision of the Court below that the indictment in its two counts was legally sufficient is contrary to the letter and the spirit of the 5th and 6th Amendments to the United States Constitution, and in conflict with the decision of this Court in the case of

United States of America vs. Morris Behrman, 258 U. S. 280, 66 L. ed. 619.

Second. Because the holding of the Court below, in the majority opinion, that the transportation in the instant case was such interstate transportation as is defined and denounced by Sections 397 and 398 of 18 U. S. C. A., is erroneous and contrary to the law.

Third. Because the holding of the Court below, in the majority opinion, that the circle vacation trip could be split up into two transportations, innocent when outward bound but criminal when home bound, defies both reason and the law.

Fourth. Because the holding of the Court below, in the majority opinion, that the actual starting point of the trip and the real intent involved when the trip was commenced can be ignored entirely, and another arbitrary and artificial starting point and intent can be conjured up is contrary to law, because the actions and intent of the accused is the determining factor, and not what some Government officer or agent might conjure up in his mind, in order to put a case on paper and prove it.

Fifth. Because the Court below, in the majority opinion, erred in holding that no error was committed by the Trial Court in refusing to give the aforementioned requested instruction, which covered the defendants' theory of the case, in regard to the question as to where the transportaiton commenced and ended and the intent involved in same.

Sixth. Because there is a direct conflict in the opinion in the case of *U. S. vs. Wilson*, 266 Fed. 712, decided by District Judge Edward T. Sanford on June 3rd, 1920, sitting in the United States District Court for the Eastern

District of Tennessee, which is in the 6th Circuit, and the opinion in the instant case as well as the opinions in the cases of *Burgess vs. U. S.*, App. D. C., 294 F. 1002; *Corbett vs. U. S.*, 9 Cir., 299 F. 27, and *U. S. vs. Winkler*, D. C., W. D., Tex., 299 F. 832, 834.

Seventh. Because the decision of the Court below that the petitioners were not entitled to have a Bill of Exceptions under Rule 7 of the rules promulgated by the Supreme Court is erroneous, and is in conflict with the decision rendered in the case of *Boynken vs. Huff*, 121 Fed. (2d) 865, decided by the Court of Appeals of D. C., and is in conflict with the decision of the Supreme Court in *Ray vs. U. S.*, 301 U. S. 158, and in the case of *Forte vs. U. S.*, 302 U. S. 223.

Wherefore your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 12531, Criminal, Hans Pete Mortensen and Lorraine Mortensen, Petitioners, vs. The United States of America, Respondent; to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court may be reversed by this Court and for such further relief as to this Court may seem proper.

EUGENE D. O'SULLIVAN,
THOMAS W. LANIGAN, and
WILLIAM P. MULLIN,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURTS BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in Pamphlet 5 of the Advance Sheets, 138 Fed. (2d) ——. No formal opinion was rendered by the Trial Court.

—o—o—

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, Section 347, Title 28, U. S. C. A.

—o—o—

STATEMENT OF THE CASE

A rather complete statement of the case having been made in the petition for the Writ of Certiorari it would serve no useful purpose to restate the case here.

—o—o—

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in not holding that the Indictment was a nullity, in that it pleaded conclusions instead of facts, was duplicitous, inconsistent, vague, indefinite and uncertain and therefore violative of the 5th and 6th Amendments to the United States Constitution, in that it did not sufficiently advise the peti-

tioners of the nature and the cause of the accusation made against them.

2. The Circuit Court of Appeals, in the majority opinion, erred in not holding that the facts in the instant case did not fall within the purview of The United States White Slave Law, 18 U. S. C. A., Sections 397 and 398, because the transportation which actually took place was not transportation in interstate commerce within the intent or meaning of the law—that is, transportation from a point in one state to a point in another state, but was a transportation from Grand Island, Nebraska, to Grand Island, Nebraska, and the touring through other states on the circle vacation trip was a mere incident to the through transportation and not transportation from one state to another—the transportation denounced by the law.

3. The Circuit Court of Appeals, in the majority opinion, erred in ignoring the real starting point of the transportation and permitting the Government to select in its place and stead an intermediate city through which the parties incidentally happened to pass while enroute on a circle vacation trip.

4. The Circuit Court of Appeals, in the majority opinion, erred in not holding that if the petitioners at the time, and prior to leaving Grand Island, Nebraska, had no intent to transport said two women in interstate commerce for immoral purposes, but left on a vacation tour, then petitioners did not violate Sections 397 and 398 of Title 18, U. S. C. A., regardless of what immoral acts said women may have committed upon their return to Grand Island, Nebraska.

5. The Court erred in refusing to give the aforesaid instruction requested by the petitioners because same, aside from stating the law correctly, covered their theory of the case.

6. The Circuit Court of Appeals erred in refusing to permit petitioners to have a Bill of Exceptions.

———o—o———

ARGUMENT

Point I.

We contend that this Indictment in each of its two counts is duplicitous and inconsistent and charges four different offenses in each count, to-wit, that the defendants *did transport, did cause to be transported, did aid and assist in obtaining transportation* and *in transporting* in interstate commerce the women in question. These way or means are improperly placed in one count, together with the language, "with the intent and purpose to *induce, entice* and *compel,* etc.

That by reason of said duplicity each of said counts contain matters which are inconsistent with other portions of the same count, and also said Indictment expressly violates the provision of Sec. 557, Title 18, U. S. C. A., which will be quoted later.

The law upon which this prosecution is grounded does not use the conjunctive AND but the disjunctive OR in reciting these separate, distinct and inconsistent ways or means of committing the offenses, but the pleader does not use the disjunctive OR, but instead uses the conjunctive AND. To draft the Indictment in the way and manner in which it is drawn and put the defendants on:

trial on same is contrary to the laws of the United States and to certain provisions of the Constitution of the United States and Amendments thereto, particularly United States Constitutional Amendments 5 and 6 and that portion of Section 8 of Article I of the said Constitution, which exclusively empowers the Congress of the United States to make all laws necesary and proper to carry into execution all of the Powers of Government, and to create and define criminal offenses and to provide punishment therefor. By alleging disjunctives in the law as conjunctives in the Indictment it amounts to an Amendment of the law by the United States Attorney and violates the right of the defendant to have the charge against him made in the language of the statute or in words of similar import, and denies him the right to have each charge made separately, and not all charges under the law made against him en masse. To make said charges in the way and manner stated in the two counts of the Indictment amounts to a denial of due process of law as guaranteed to the defendant under the 5th Amendment to the United States Constitution and to a denial of defendants' rights under the 6th Amendment to the Consitution of the United States which requires a defendant to be informed of the nature and cause of the accusation against him, without evasion and with precision and certainty.

It is not stated specifically in any of the two counts of the Indictment whether the charge was based on the theory that the defendants *did transport, did cause to be transported, did assist in obtaining transportation for, or in transporting* or whether the intent and purpose was to *induce, entice* or *compel* the women to be transported in interstate commerce, all of which means different things.

The intent and purpose are necessary and essential elements of the offenses created by Section 398 of Title 18, U. S. C. A., upon which this Indictment is predicated. There is no sufficient or proper allegation in the Indictment alleging any intent or specific intent but merely a blanket charge of a general and unspecified intent which might be one of the three but probably not all of the intents alleged, and this also amounts to a violation of the defendants' right to be accorded due process of law as guaranteed by the 5th Amendment to the United States Constitution and is also violative of that portion of the 6th Amendment to the United States Constitution which in so far as applicable, provides that the accused shall have the right to be informed of the nature and cause of the accusation made against him.

This Indictment in its two counts, and each of said counts, fails to allege the offenses attempted to be pleaded in the language of the statute or in language of similar import as that contained in the portion of the law creating and defining the said offense, to-wit, Section 398 of Title 18, U. S. C. A., because the pleader uses AND for OR without any legislative authority.

The Indictment in its two counts fails to plead sufficient facts so as to bring the matters alleged within the law and to inform this defendant with sufficient particularity and certainty as to the precise charge attempted to be made against him and fails to disclose to the defendant the necessary and proper facts relative to the claimed commission of the alleged offenses charged in each of said counts and contains mere conclusions and does not plead facts, and also the allegations are vague, indefinite and uncertain and do not state sufficient facts or circumstances tending to identify the particular manner in which the offense was committed.

In *U. S. vs. Hunt* (C. C. A., Ill., 1941), 120 F. (2d) 592, it is stated:

> "An indictment charging two defendants in six counts of violating section 397, et seq., of this title, in causing two girls to be transported from one state to another for purposes of prostitution, which named date of trip, the girls involved, the mode of transportation, and object of transportation, using statutory terms, was sufficient, as against contention that indictment was too vague."

The Indictment in the instant case does not measure up to the standard of *U. S. vs. Hunt,* supra.

A perusal of each of the counts of the Indictment discloses that neither of them are suffieiently informative, specific, definite and certain as to satisfy constitutional requirements under the applicable portions of the 5th and 6th Amendments to the Constitution of the United States, there being an utter failure on the part of the pleader to allege all of the essential facts such as the way, means or manner by which the alleged interstate transportation was accomplished or planned or contemplated, and there is also an utter failure on the part of the pleader to specifically allege whether or not said defendant *transported* or *caused to be transported in interstate commerce* or *aided and assisted in obtaining transportation* or *transporting* the women in question. The identifying or tending to identify the particular offenses attempted to be charged renders said Indictment a nullity. Any law or rule of law established by the Courts which authorizes, or pretends to authorize, an indictment such as was had in this case should be held to be unconstitutional, null and void for the reasons herein asigned.

We are familiar with the rule of law which has been applied in numerous cases, and that is,—that an indict-

ment can follow the language of the statute and may contain a number of ways in which an offense could be committed, if the different ways are connected by the conjunctive "and" and not the disjunctive "or," but it is our contention that such a course of procedure can be followed legally, only when there is no inconsistency between any of the various ways it is alleged that the defendant employed to commit the offense. An indictment of murder could not charge in one count that the defendant shot, poisoned, choked, kicked, beat, speared, drowned and gassed the victim, thereby causing the victim to die and take pot luck on which would, upon the trial, fit the case from the standpoint of proof. Such pleading would never be proper for the reason that it would not be in the language of the statute and there would be a lack of directness. Such pleading would not only confuse a defendant, but would also confuse a jury if the case ever went to the jury. The better reasoning suggests that every charge should be made with particularity, definiteness and directness and be such as to advise a defendant of the nature of the accusation. The charge in the instant case cannot be held to satisfy such requirements.

Section 557 of Title 18, heretofore referred to, states that "When there are several charges against any person for the same acts or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated."

The use of the word "may" in connection with permitting a joining of several such counts in one indictment

should be construed to be mandatory and not directory, because if the pleader had to get legislative authority to put these counts in one indictment, then certainly he has no statutory or other authority to lump a number of counts together, some of them inconsistent, in one all-embracing count.

In *Roark vs. U. S.* (C. C. A., Colo., 1927), 17 F. (2d) 570, 51 A. L. R. 870, it is stated:

> "Distinct violations growing out of same transaction are separate offense. Transporting woman and inducing her to be transported for immoral purpose, though single transaction, constitute separate offenses. Id."

In a civil case no pleader would contend that he did not have to state and number his various causes of action or be consistent in his allegations. He would not have the audacity to put all of his separate claims, both consistent and inconsistent, in one cause of action.

Certain decided cases, such as *Crain vs. U. S.*, 162 U. S. 625, 40 L. Ed. 1097; *Conners vs. U. S.*, 158 U. S. 408, 39 L. Ed. 1033, and *Bridgeman vs. U. S.*, 140 Fed. 577, have encouraged criminal pleaders to become incorrect and obscure. These three cases hold that it is not error to charge that a defendant did an act and caused it to be done, etc., but I do not believe that a close reading of any of these cases would convince this Court that an Indictment such as the one in this case should be legally approved. It is just about the "omega" of license in criminal pleading.

In the case of *United States vs. Morris Behrman*, 258 U. S. 280, it is said in paragraph 2 of the syllabus:

"It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation, and to plead the judgment, if one be rendered, in bar of a further prosecution for the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent."

In the body of the opinion at pages 288 and 289 it is said:

"It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation, and to plead the judgment, if one be rendered, in bar of future prosecution for the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent. United States v. Smith, 2 Mason 143, Fed. Cas. No. 16,338; United States v. Miller, Fed. Cas. No. 15,775; United States v. Jacoby, 12 Blatchf. 491, Fed. Cas. No. 15,462; United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594 (opinion by Miller, Circuit Justice); United States v. Bayard, 21 Blatchf. 287, 16 Fed. 376, 383, 384; United States v. Jackson, 25 Fed. 548, 550; United States v. Guthrie, 171 Fed. 528, 531; United States v. Balint, this day decided, 258 U. S. 250, ante, 604, 42 Sup. Ct. Rep. 301."

We submit that the indictment in the instant case does not measure up to these requirements.

Points II, III and IV.

It was the contention of the defendant at all times that the facts did not bring this case within the purview of the White Slave Traffic Act, and thus being violative of

Section 397 and 398 of Title 18, U. S. C. A., because it was intentional transportation from a point within Nebraska, to-wit, Grand Island, to the same point within Nebraska, and that the passing through other states was an incident only to the circle vacation tour and was not a transportation from one state to another (*U. S. vs. Wilson*, 266 Fed. 712). The defendant further contended that if the Government had alleged the true facts in the Indictment that the Indictment would not have charged a crime under Section 398 of Title 18, U. S. C. A., and therefore the defendant, in order to avoid the expense of a trial, offered to prove the true facts, which were known to the Grand Jury and when the Indictment was returned, and the Government, by its Demurrers, admitted the truth of the claim. The defendant has claimed at all times that the Indictment was a skillful circumvention of the law and an adroit evasion of the letter and spirit of the law.

The pertinent portions of the statute for the purpose of this inquiry are as follows:

> "397. WHITE-SLAVE TRAFFIC; TERMS DEFINED. The term 'interstate commerce,' as used in this section and sections 398 to 404 of this title, shall include transportation *from* any State or Territory or the District of Columbia *to* any other State or Territory or the District of Columbia."

> "398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES. * * * Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, * * *, any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

This statute contemplates a starting point in one state, as is indicated, and a destination in another state, and does not contemplate that the starting point and the destination or ending of the transportation could both be in the State of Nebraska, the same state where the contemplated trip, according to the intention of the parties, was to have its beginning and its ending. If this sort of a situation was contemplated by Congress when the Act was passed, then the language of the statute would so indicate. The Court has no authority to read into this statute something which the law-makers did not specifically put there. This is a criminal statute and as such, under the well-known and uniform holdings, it must be construed strictly.

The facts which the Government admitted by its Demurrers to the Plea in Abatement and Motion to Quash are as follows:

> "That the appellants are husband and wife, and reside at Grand Island, Nebraska, and have been such residents for more than two years last past; that in August, 1940, appellants were contemplating a summer vacation circle trip from Grand Island through several western states, and to return to their home in Grand Island when they had finished their vacation and sightseeing; that Margaret Smith and Doris McMahon, alias Goldie Wright, named in the first and second counts of the indictment, were residents of Grand Island, Nebraska, and proposed to the defendants that they accompany defendants on the vacation trip to the mountains and pay their own expenses; that the defendants agreed to this arrangement, and the two girls named in the Indictment accompanied the defendants on the vacation circle trip and paid their own expenses; that on or about the 22nd day of August, 1940, the defendant and the two girls named in the Indictment left Grand Island, proceed-

ing through Wyoming, Utah and Montana, and returning several days later by way of Colorado to Grand Island; that no immoral acts were committed by any of the parties on the trip and that the only intent and purpose was for a vacation, with no intent to violate Section 398 of Title 18, U. S. C. A., or any other Federal Statute, for the purpose of prostitution or debauchery, or with the intent or purpose to induce, entice and compel said girls to give themselves up to debauchery, or to engage in immoral practices, all of which was well known to the Government officials in charge of the prosecution at the time of the returning of the Indictment."

In *U. S. vs. Wilson*, 266 Fed. 712, opinion by Judge Sanborn, the defendant was indicted on a charge of violating the White Slave Traffic Act, tried, found guilty, and judgment of imprisonment pronounced upon him. No question as to whether or not the law denounced the acts in question was raised before or at the trial; however, shortly thereafter the question having arisen in the mind of the Court, he requested briefs on the question involved.

The indictment and proof showed that the woman in question was transported in interstate commerce from Nashville, Tennessee, through the State of Tennessee and by way of Stevenson, Alabama, into Hamilton County, Tennessee, over the lines of Nashville, Chattanooga & S. S. Railroad Company.

The White Slave Traffic Act specifically provides that the words "interstate commerce," as used in the Act, shall "include transportation from one state * * * to another state." This definition necessarily excludes, by implication, transportation from one point in a state to another point in the same state. In interstate commerce, the words "from" and "to," as used in the Act, manifestly refer to two different states as the *respective points*

of *origin* and *final destination* of the *transportation;* and not a state through which the woman is carried as a *mere incident* to the through transportation.

The proof showed a transportation from Nashville, Tennessee, to Chattanooga, Tennessee, with merely incidental passage through Alabama and not a transportation from Alabama to Tennessee, within the meaning of the Act.

"*Held:* Indictment insufficient under true construction of Statute, and judgment set aside."

In *U. S. vs. Grace,* 73 Fed. (2d) 204:

The defendant was charged with transporting a young woman in interstate commerce from the Eastern District of New York to Washington, D. C., for the purpose of prostitution and debauchery and other immoral purposes.

The evidence showed that the complainant came from Philadelphia to Brooklyn with her Bishop to give testimony at an ecclesiastical trial over which appellant presided. Later she rode back from Brooklyn to Philadelphia, through New Jersey, with appellant, his chauffeur driving, and that appellant attempted to have intercourse with her on floor of car going through New Jersey, but unsuccessfully. They remained in Philadelphia two weeks, during which time appellant took immoral liberties with her, but did not have intercourse with her. He then asked her to go to Baltimore, Maryland, with him, where they remained a short time, but appellant did not have sexual relations with her. Later they went to Washington, D. C., to appellant's home, where she did have sexual relations with him.

"*Held:* That in order to constitute the offense charged, there must be substantial evidence that the

intention to transport the woman for immoral purposes must have been formed by the parties before they reached the foreign state."

The statute makes the intent and purpose an element of the crime, and if the journey was planned with no immoral purposes at the time, no crime was committed, no matter what may have occurred thereafter. It is the immoral purpose which renders interstate commerce criminal. The immoral relationship, standing alone, unconnected with interstate commerce, does not violate the act.

Inducing the girl to go from one state to another with any other purpose, except formed immoral intent at the outset, is insufficient to constitute a violation of the White Slave Law.

We have the simple situation of the trip being undertaken for legitimate purposes, and the immoral purpose, intent and relations arising after the transportation, so that the purpose and intent were not present before or during the transportation.

In *Sloan vs. U. S.*, 287 Fed. 91, it is stated:

"that since the White Slave Traffic Act is valid only under the commerce classification of the National Constitution, Art. 1, Sect. 8, Clause 3, there must, in order to constitute the offense charged, be substantial evidence that the intention to transport the women for immoral purposes was formed by the parties before they reached the foreign state to which she was transported, since the immoral act itself is exclusively within the jurisdiction of the police power of the state where it was committed."

The Court further held that the intent must arise before the transportation. This is a perfectly sound rule.

In this case the defendant took the woman involved to St. Louis to visit her sister, and it was only after their arrival there that the matter of immoral relations arose. There is no question about the correctness of the Court's holding.

In *Drossos vs. U. S.*, 16 Fed. (2nd) 833, it is said:

> "No crime is committed unless the interstate transportation of the female was planned and made with immoral purpose."

The woman involved was threatened by her husband, who had stated that he would kill her if he found her at their home when he returned from work. Under this threat she left home with her small children and called on the defendant, a family friend. Defendant took her to another state with the thought and intention that they would be married and live together there. There was no consideration of any illegal relations before or at the time the trip was made. After the trip was completed and the parties, who apparently were of foreign extraction, and not familiar with the laws of this country, learned that they could not be married because she already had a husband, so they began living together. Under these facts it was disclosed that the purpose and intent of immoral relations arose after the transportation had been completed, and not before the transportation, and it was held that the White Slave Act had no application to this state of facts.

In *Biggerstaff vs. U. S.* (C. C. A., 8th Circuit), 260 Fed. 926, it is stated:

> "A violation of the act requires that the transportation shall be for an immoral purpose and the mere commission of an immoral act by defendant

while on the interstate journey with a woman for a lawful purpose does not, where the immorality was merely casual, constitute a violation of the act."

In *Alpert vs. U. S.* (C. C. A., N. Y.), 12 Fed. (2nd) 352, the Court said:

"The journey from one state to another if followed by illicit intercourse does not result in violating the act where the journey was made for a wholly different reason."

In *Fisher vs. U. S.* (C. C. A., West Va., 1920), 266 Fed. 667, it is stated:

"The transportation in interstate commerce must have for its object, or be the means of effecting or at least facilitating, the sexual intercourse of the parties. If the journey was for other reasons to which intercourse was not related the interstate transportation and eventual sexual intercourse cannot be regarded as a violation of the White Slave Act."

In the case of *Van Pelt vs. U. S.*, 240 Fed. 349, where a pregnant girl requested defendant to take her from Washington, D. C., to Baltimore, so that she might go into seclusion during her approaching confinement, and he did so, and made the arrangements and gave her more than enough money to pay the transportation and accompanied her to her destination, the Court, at page 349 of the opinion, said:

"There can be no doubt that the girl was brought to Baltimore in order that she *might* go into *seclusion*. The defendant may have *anticipated* that he would gratify his desire, as he doubtless would have done had the trip never *taken place*, but *there is no evidence that such anticipation played any part whatever in inducing him to arrange for her coming to Baltimore.*"

Again, on page 348 of the opinion, the Court said:

> "Before he could be convicted the evidence *must show that he took* a hand in *procuring* the transportation for the *particular purpose charged* in the *indictment.*"

In *Shama vs. U. S.*, 94 Fed. (2d) page 1 (Certiorari denied 304 U. S. 568), it is held that an immoral purpose first conceived at the end of a journey is not sufficient under Section 398 of Title 18, U. S. C. A., to constitute a crime.

It is the inducement and transportation, not the subsequent conduct, which constitutes an offense under Section 398 of Title 18, U. S. C. A.

In *Coltabellotta vs. U. S.* (C. C. A., N. Y., 1930), 45 F. (2d) 117, it is stated:

> "To constitute a violation of this section there must exist a present intent to transport the female in interstate commerce for immoral purposes."

In *Hunter vs. U. S.* (C. C. A., Va., 1930), 45 F. (2d) 55, it is stated:

> "A conviction for a violation of this section requires a showing that the purpose in transporting the woman in interstate commerce was to have sexual intercourse with her."

In *Ghadiali vs. U. S.* (C. C. A., Or., 1927), 17 F. (2d) 236, certiorari denied (1927), 47 S. Ct. 660, 274 U. S. 747, 71 L. Ed. 1328, it is stated:

> "A secretary may be transported in interstate commerce without a violation of sections 397 to 404 of this title in the absence of a purpose to have sexual intercourse."

In *Yoder vs. U. S.* (C. C. A., Okla., 1935), 80 F. (2d) 665, it is stated:

> "Under the statute the prospect of sexual relations must have some relation to and be one of the reasons or purposes of the trip; but, if the sole purpose of the trip is legitimate, purely incidental intent to have intercourse is not a federal offense."

The following well chosen language taken from the minority opinion in this case by Circuit Judge Woodrough, perhaps analyzes more clearly and distinctly the true legal aspect better than the writers of this brief could do:

> "Recognizing, as the record requires, that the business at appellants' house in Grand Island, Nebraska, was carrying on prostitution, I think there is a fallacy in spelling a crime out of the act of taking the inmates away from their place of prostitution and stopping it for the two weeks' period of vacation travel. In the Mann Act Congress has exercised its powers in the field of interstate commerce to prevent transportations in interstate commerce in furtherance of sexual immorality. I do not think its provisions contemplate, or can be extended to transportations that are not in furtherance and have nothing to do with sexual immorality except to interrupt and stop its practice for a period. The law has been on the books a long time and none of the cases cited appears to me to lend support to the affirmance. Wilson vs. United States, 266 F. 712, is to the contrary, so far as it is in point. But there the transportation may have been in furtherance of the immoral practices, and I do not rely on it. It seems obvious to me that aiding prostitutes to travel away from their foul environment for even a short vacation period is not evil conduct and that it is not the intent of the Act to make it criminal. Splitting the round trip into two transportations, innocent while outward bound

but criminal on the homeward lap, seems to me a mental operation that reflects ingenuity for the prosecutor rather than fair application of the Act to what the appellants did.

"I can discern only one intent of all the parties of the trip, and that was to take a vacation. They went away with that intent and held to it till they got back. The penitentiary sentences imposed upon these appellants for doing that and nothing more seem to me erroneous."

Point V.

If the view taken by Circuit Judge Woodrough, in the minority opinion, is correct, then the requested instruction refused by the Court, heretofore quoted verbatim, should have been given by the Court, because it covered correctly the defendants' theory of the case.

Point VI.

We feel that this Court should reconsider and reverse the ruling made at Kansas City, Missouri, on March 24, 1943, in which the Application of Appellants for leave of Court to have a Bill of Exceptions and to extend the time for serving, settling and filing same was denied. At the time of this hearing a copy of the Transcript of the Evidence was not filed with the Court for it to consider, along with the application, affidavits and exhibits. Appellants will transmit the original of this Transcript of the Evidence to Hon. E. E. Koch, Clerk of this Court, at the time of the filing of this brief so that if the Court desires to examine same at any time it may do so. By not being permitted to have a Bill of Exceptions the appellants were prevented from urging and arguing Assignment of Errors 9, 17, 18, 19, 20, 21, 23, 26 and 27.

It is our contention that these appellants should not have been penalized by not being allowed to have a Bill of Exceptions when both counsel for appellants and the Court were at fault—counsel in not getting an extension of time before 30 days had expired and the Court for not calling the meeting within 30 days.

Rule 7 of the Rules of Procedure in Criminal Cases states that:

> "The Clerk of the trial Court shall *immediately* notify the trial judge of the filing of the Notice of Appeal, and *thereupon* the trial judge *shall at once* direct the appellant or his attorney and the United States Attorney, to appear before him *and shall give such directions* as may be appropriate with respect to the preparation of the record on appeal including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings."

The Clerk acted promptly in the premises.

This rule makes it mandatory for the Clerk to notify the Judges *immediately* and *thereupon* the trial judge *shall at once direct* counsel to appear and *shall* give such directions, etc. Does this rule contemplate that the Judge shall set the place of the meeting and hesitate to set the time without consulting appellants' counsel, and invite defense counsel to set a date best suited to his convenience, as the Judge's letter at pages 45 and 46 of the Transcript discloses?

Counsel for appellants then replied to the Judge's letter and, among other things, told the Court: "I would suggest that you set a date" (Tr. p. 47).

The Judge's Secretary then on February 1, 1943, advised counsel that the Trial Judge "is in the hospital

with a bad cold but is expected to return to the office within a few days."

Appellants' counsel waited for a date to be set for the meeting and was lulled into security. No answer was given to his inquiry about the length of time he had in which to file his Bill of Exceptions (Tr. p. 47). He was cited to rules (Tr. pp. 47, 48). Then he received notice to appear on February 26, 1943, for the meeting under Rule 7, which was two days after the expiration of the 30-day period. Does this sound fair? Was this notice of the Judge's sent out at once as provided for by Rule 7? Were appellants entirely at fault? No other answers could be truthfully made to these inquiries except in the negative. The first case decided upon the question presented under this point was *Wolpa vs. U. S.*, 84 Fed. (2d) 829. It was decided on July 20, 1936, by the Circuit Court of Appeals for the Eighth Circuit, but is not in point, as far as this case is concerned. The case of *Ray vs. U. S.*, 301 U. S. 162, was decided April 26, 1937.

The Court said in this case that "The rule presupposes that the Trial Judge, who is familiar with the proceedings on the trial, is in a position to estimate the length of time necessary for the preparing and the filing of the Bill of Exceptions and that the Judge is permitted, within 30 days after the taking of the appeal, to fix the time for the serving, settling and filing of same."

Rule 4 of the Rules of Criminal Procedure provides:

"RULE 4. CONTROL BY APPELLATE COURT.

"The Clerk of the trial court shall immediately forward the duplicate notice of appeal to the Clerk of the Appellate Court, together with a statement

from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its Clerk of the duplicate notice of appeal, the Appellate Court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

"The Appellate Court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

The rule specifically gave the Circuit Court of Appeals full authority to set aside or modify the Trial Judge's order *whenever it appears* that there has been an abuse of discretion or *that the interest of justice require it.*

The rule provides for the correction of any miscarriage of justice in this respect.

Did the Trial Judge ever, within 30 days, fix the time for the serving, settling and filing of the Bill of Exceptions in this case? Certainly he did not do so, and that fact is unmistakably and clearly shown by the record. What the Trial Judge really did was done 28 days after the filing of the Notice of Appeal. He directed counsel to appear in Chambers, at Omaha, Nebraska, within the 30-day period and in doing so he fixed the date of the meeting of counsel 2 days after the 30-day period had expired, and consequently this procedure resulted in the appellants being denied their rights to have a Bill of Exceptions in this case. Certainly he did not do so, and that

cannot be regarded as a reasonably fair compliance with Rule 7 because the Trial Court was required under Rule 7 to set the date of his meeting with counsel "at once" after being advised of the Appeal by the Clerk.

In *Boynken vs. Huff*, 121 Fed. (2d) 865, the Trial Judge settled the Bill of Exceptions at a time beyond the time allowed and a Motion to Strike the Bill of Exceptions was denied by the Circuit Court of Appeals.

The Court further stated that the letters in this case between the defendant and the Trial Judge are set out. The defendant had no counsel on appeal. Judge Rudlige said on page 873: "*The initiative* in matters relating to preparations of the record is on the trial judge or clerk of the trial court." Under Rule 7 it is made the duty of the Judge to *act at once* and *direct* appellant or his attorney and the United States Attorney to appear before him and give instructions. This was not done in this case. The only rule which specifies a particular time limit is that part of Rule 9 which sets the time to be 30 days after the appeal. *But neither this nor any other requirement subsequent to taking the appeal can be regarded as jurisdictional* in the light of *Forte vs. U. S.* (1937), 302 U. S. 223, where the Court said: "*from the time of taking the appeal the court of appeal has complete supervision and control of the proceedings on the appeal including proceedings relating to the preparation of the record, * * * to vacate and modify any order made by the trial judge concerning prosecution of the appeal including the fixing of the time for settlement and filing of the Bill of Exceptions.*" This case cites and follows *Ray vs. U. S.*, 301 U. S. 158. The Court refused to strike the Bill of Exceptions settled out of time. No extension for settlement of the Bill of Exceptions had been given.

CONCLUSION

We submit that for the reasons stated herein, the Writ of Certiorari should be granted.

Respectfully submitted,

EUGENE D. O'SULLIVAN,
of Omaha, Nebraska,

THOMAS W. LANIGAN and
WILLIAM P. MULLEN,
of Grand Island, Nebraska,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 559

HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

EUGENE D. O'SULLIVAN,
Of Omaha, Nebraska,

THOMAS W. LANIGAN,
Of Grand Island, Nebraska,

WILLIAM P. MULLIN,
Of Grand Island, Nebraska,
Counsel for Petitioners.

Law Brief—OMAHA LINO-SLUG CO.—413 So. 18th St.

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1943

—o—o—

No. .....

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HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

—o—o—

AMENDED AND SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

—o—o—

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION SOUGHT TO BE REVIEWED

Your petitioners, Hans Pete Mortensen and Lorraine Mortensen, and each of them, respectfully pray that a Writ of Certiorari issue to review a decision of the Circuit Court of Appeals for the Eighth Circuit, rendered

on November 23rd, 1943, at St. Louis, Missouri (R. 79 to 84, incl.), and affirming the conviction, by a divided Court, of your petitioners in the United States District Court for the District of Nebraska, Grand Island, Nebraska, Division, Honorable James A. Donohoe, United States District Judge, presiding.

—o—o—

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED

These petitioners were indicted in the District Court, as aforesaid, on an indictment returned on January 28th, 1941, containing two counts of which Count 1 (R. 1 and 2) charged that the defendants on September 4th, 1943, did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting, in interstate commerce, from Salt Lake City, Utah, to Grand Island, Nebraska, a certain named woman, for the purpose of prostitution and debauchery and with the intent and purpose to induce, entice and compel said woman to give herself up to debauchery and to engage in immoral practices; and Count 2 (R. 2) charged them with an exactly similar offense, except that a different woman was named as the person so transported.

The petitioners filed a Plea in Abatement and Motion to Quash the Indictment (R. 3 to 6, incl., and R. 9); filed a written offer to prove certain facts (R. 7 and 8). The respondent demurred to these pleadings (R. 6 and 7), which demurrer was overruled (R. 11 and 12) and the Government was given leave to and did file an answer thereto in which was incorporated a demurrer (R. 10) and after hearings thereon these pleadings were over-

ruled (R. 11), exceptions were taken thereto and allowed by the Court (R. 11).

The indictment was assailed by these pleadings on the grounds that same did not plead facts but pleaded conclusions, was duplicitous, inconsistent, vague, indefinite and uncertain, and was not sufficiently informative so as to satisfy the requirements of the 5th and 6th Amendments to the United States Constitution, by according them due process of law and by advising the petitioners of the nature and cause of the accusations made against them, and because each count of the Indictment embraced divers ways, means and manners in which White Slavery could be committed under the law, all of said ways, means and manners being connected up by the pleader by substituting the conjunctive "and" for the disjunctive "or," used in the statute.

It was the contention of the petitioners, as disclosed by the foregoing pleadings and admitted by the Demurrers of the respondent, that the facts relating to interstate transportation did not bring this case within the purview of Sections 397 and 398 of 18 U. S. C. A., the Anti-White Slave Traffic Act, because the actual transportation of these two women was from a point in the State of Nebraska, to-wit, Grand Island, to the same point in the State of Nebraska, and that the transportation of the petitioners and these two women through other states was for the purpose and intention of taking a circle vacation tour, or trip, and it was not the intentional transportation denounced by the law, and that the respondent in order to make a case on paper had selected Salt Lake City, Utah, as the starting point of the transportation, which city was merely one of the cities which the parties

had passed through on the circle vacation trip on their way back home.

In line with their theory of the case counsel for the petitioners requested and the Trial Court refused to give the following instruction, to which refusal an exception was taken and allowed by the Court (R. 14):

> "If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska, and that the final destination was Grand Island, Nebraska, and the states of Colorado, Wyoming and Utah were incidently gone through, you are instructed that the White Slave Traffic Act specifically provides that the words 'interstate commerce' as used in the Act shall include transportation from one state to another state. This definition necessarily excludes by implication transportation from one point in a state to the same point within the same state, and if you so find, then you shall bring in a verdict of not guilty as to both defendants on each count of the indictment."

Thereafter pleas of not guilty were entered (R. 11 and 12), a trial was had (R. 11 and 12), and after all of the evidence had been submitted a written Motion to Dismiss was filed (R. 23 to 25, incl.), same was overruled, and upon argument and submission, the jury returned a verdict of guilty on both counts (R. 13), and each of said parties received a sentence of 3 years imprisonment on each of the two counts of the Indictment, said sentences to run concurrently, and Hans Pete Mortensen was also sentenced to pay a fine of $500.00 on each of said two counts (R. 14 to 16).

Later a Motion for a New Trial was filed and overruled (R. 16 to 22, incl.), Notices of Appeals were filed

(R. 30, 31), Bail and Cost Bonds were posted (R. 26 to 30, incl.).

Thereafter, pursuant to the provisions of Rule 7 of the Rules of Procedure in Criminal Cases promulgated by the Supreme Court, the Clerk notified the Trial Judge of the filing of the Notices of Appeal (R. 45), but the Trial Judge did not *at once* notify the respective attorneys to appear before him, so as to give directions to counsel with respect to making up the record on appeal (R. 45, 46), and said attorneys were never notified pursuant to the provisions of Rule 7 so to do until 2 days after the statutory 30-day period had expired (R. 32, 33), and then the Trial Court denies the petitioners the right to a Bill of Exceptions (R. 42, 43, 50, 51), but permitted an appeal to be taken on the Transcript alone, pursuant to Rule 8 of the Rules promulgated by the Supreme Court (R. 43, 44).

Thereafter application was made to the Circuit Court of Appeals for the Eighth Circuit to allow petitioners a Bill of Exceptions, and both a showing and counter showing was made, and after arguments of counsel were had the petitioners were again denied a Bill of Exceptions (R. 50 to 77, incl.).

In petitioners' brief filed in the Circuit Court of Appeals the matter of the denial of a Bill of Exceptions to them was again urged as error and this matter was argued to the Court, but same was to no avail (Opinion footnote, R. 81).

A reading of this footnote to the majority opinion of the Circuit Court of Appeals (R. 41) discloses a very unusual way of handling and considering this question. The

record was unofficially read, judgment was passed thereon, and no opportunity was afforded these petitioners to have a review by this Court of this unofficial finding.

BASIS OF JURISDICTION

The jurisdiction of this Court is invoked:

(a) Under that part of the 5th Amendment to the United States Constitution which in so far as applicable provides "that no person shall * * * be deprived of * * * liberty * * * without due process of law."

(b) Under that part of the 6th Amendment to the United States Constitution which in so far as applicable provides "that in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" made against them.

(c)) Because this is a prosecution under the laws of the United States, to-wit, Sections 397 and 398 of 18 U. S. C. A., known as the Anti-White Slave Traffic Act, and involves a Judicial Construction of the scope, intent and meaning of these Statutes of the United States, and the jurisdiction over the alleged offenses is grounded upon knowingly transporting, causing to be transported, or aiding and assisting in obtaining transportation for, or in transporting a woman or girl, in interstate commerce, for the purpose of prostitution or debauchery, and the ultimate question presented and to be determined is whether or not a harmless and laudable circle vacation trip of a man and wife and two prostitutes, beginning and ending at the same place in a State, but passing through other States enroute, is denounced by these

Statutes and amounts to a violation of these Statutes, if prostitution for gain occurred in petitioner's hotel between these women and men other than the defendant, both before and after the circle vacation trip was made.

(d) Because in passing upon the question presented by Subsection (e), infra, there is a direct conflict in the opinion in case of *U. S. vs. Wilson*, 266 Fed. 712, a District Court decision from the 6th Circuit, and the opinions in *Burgess vs. U. S.* (App. D. C.), 294 F. 1002; *Corbett vs. U. S.*, 299 F. 27, 9th C. C. A., and *U. S. vs. Winkler* (D. C., W. D., Tex.), 299 F. 834, and the instant case.

(e) Under the provisions of the 5th Amendment to the Constitution of the United States relating to due process of law, the failure and refusal of the Trial Court to give an instruction covering the defendants' theory of the case as shown by their evidence amounts to a denial of a constitutional right.

(f) Because the denial of a Bill of Exceptions to petitioners by the Trial Judge, and the Circuit Court of Appeals is in direct conflict with the provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States relating to appeals in criminal cases from the District Court to the Circuit Court of Appeals, and is also in direct conflict with the decisions in *Boynken vs. Huff*, 121 Fed. (2d) 865, decided by the United States Circuit Court of Appeals for the District of Columbia, and *Ray vs. U. S.*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976, and *Forte vs. U. S.*, 302 U. S. 223, 58 S. Ct. 180, 82 L. ed. 209.

(g) Under Section 240 of the Judicial Code, as amended by the Act of February 13th, 1925, C. 229, Sec-

tion 1, 43 Stat. 938, now Section (a) 347, Title 28, U. S. C. A.

The judgment to be reviewed, as aforestated, is the judgment of the Circuit Court of Appeals for the 8th Circuit entered on November 23rd, 1943 (R. 79 to 83, incl.), and the 30-day period allowed to apply for this writ, exclusive of Sundays and holidays, expires December 30th, 1943.

—o—o—

QUESTIONS PRESENTED

(a) Does an Indictment whose allegations are not only in the language of the Statute, but which embraces in each count thereof, by use of the conjunctive "and," divers ways, means and manners in which an offense may be committed under the Statute, some of which are inconsistent with others, satisfy the constitutional requirements under that part of Article 5 of the Amendments to the United States Constitution relating to due process of law, and that part of the 6th Amendment to the United States Constitution relating to the right of an accused to be informed of the nature and cause of the accusation made against him, and is such an indictment in each of its counts vulnerable to the claim that it pleads conclusions instead of facts and is vague, indefinite and uncertain and duplicitous?

(b) Do Sections 397 and 398, Title 18, of the United States Anti-White Slave Law, as follows—

> "397. WHITE-SLAVE TRAFFIC; TERMS DEFINED. The term 'interstate commerce,' as used in this section and sections 398 to 404 of this title, shall include transportation *from* any State or Ter-

ritory or the District of Columbia to any other State or Territory or the District of Columbia."

"398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES. * * * Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, * * *, any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

define and denounce as an offense against the United States a state of facts where persons take prostitutes employed in their hotel on a circle vacation trip and incidently on said trip going and coming home pass through several states, and can the Government ignore the real starting point of the transportation and of its own accord select a starting point of their own choosing, which was the place where the parties started back on their homeward journey?

(c) Can the real intent to take these prostitutes on a vacation trip be ignored and another intent be conjured up by the law enforcing authorities, because of the fact that prostitution occurred both before and after the circle vacation trip was taken?

(d) Is it proper for a Trial Judge in a District Court of the United States to refuse to give, upon the request of the defendants, an instruction to the trial jury covering their theory of the case?

(e) Can defendants, who seek to appeal from their conviction in the District Court of the United States, be

deprived of a Bill of Exceptions on said appeal because of the failure of the Trial Judge to comply with the mandatory provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States for such appeals in criminal cases, from the District Court of the United States to the Circuit Court of Appeals of the United States, which rule is as follows:

> "'The Clerk of the trial Court shall *immediately* notify the trial judge of the filing of the Notice of Appeal, and *thereupon* the trial judge *shall* at *once* direct the appellant or his attorney and the United States Attorney, to appear before him *and shall give such directions* as may be appropriate with respect to the preparation of the record on appeal including direction for the purpose of making promptly available all necessary transcripts of testimony and proceedings.'"

(f) Is it an abuse of discretion on the part of a Trial Judge of the United States District Court and of the Circuit Court of Appeals to deny appellants a Bill of Exceptions when the failure to procure one was due to the fact that the Trial Judge, although setting the place for the meeting of counsel for the purpose of giving directions relating to the making up of a Bill of Exceptions, did not "at once" set the date of said meeting, but delayed setting the date until 2 days after the statutory 30-day period had expired?

(g) Under Rule 4 of the Rules promulgated by the Supreme Court of the United States in reference to criminal appeals from the District Court to the Circuit Court of Appeals, it is provided:

> "'From the time of the filing with its Clerk of the Duplicate notice of appeal, the Appellate Court shall, subject to these rules, have supervision and con-

trol of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.' "

Is it not the duty of the Circuit Court of Appeals under that portion of Rule 4 to permit a Bill of Exceptions in a case such as the instant case?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The discretionary power of this Court to grant a writ of certiorari is invoked on the following grounds:

First. Because the decision of the Court below that the indictment in its two counts, and each of them, was legally sufficient is contrary to the letter and the spirit of the 5th Amendment to the United States Constitution relating to due process of law, and contrary to the 6th Amendment relating to the right of defendants to be informed of the nature and cause of the accusations made against them, and in theory in conflict with the decision of this Court in the case of *United States of America vs. Morris Behrman*, 258 U. S. 280, 66 L. ed. 619.

Second. Because the holding of the Court below, in the majority opinion, that the transportation in the instant case was such interstate transportation as is defined and denounced by Sections 397 and 398 of 18 U. S. C. A., is erroneous and contrary to the law.

Third. Because the holding of the Court below, in the majority opinion, that the circle vacation trip could be split up into two transportations, innocent when outward bound but criminal when homeward bound, defies both reason and the law.

Fourth. Because the holding of the Court below, in the majority opinion, that the actual starting point of the trip and the real intent involved when the trip was commenced can be ignored entirely, and another arbitrary and artificial starting point and intent can be conjured up is contrary to law, because the actions and intent of the accused is the determining factor, and not what some Government officer or agent might conjure up in his mind, in order to put a case on paper and prove it.

Fifth. Because the Court below, in the majority opinion, erred in holding that no error was committed by the Trial Court in refusing to give the aforementioned requested instruction, which covered the defendants' theory of the case, in regard to the question as to where the transportaiton commenced and ended and the intent involved in same.

Sixth. Because there is a direct conflict in the opinion in the case of *U. S. vs. Wilson*, 266 Fed. 712, decided by District Judge Edward T. Sanford on June 3rd, 1920, sitting in the United States District Court for the Eastern District of Tennessee, which is in the 6th Circuit, and the opinion in the instant case as well as the opinions in the cases of *Burgess vs. U. S.*, App. D. C., 294 F. 1002; *Corbett vs. U. S.*, 9 Cir., 299 F. 27, and *U. S. vs. Winkler*, D. C., W. D., Tex., 299 F. 832, 834.

Seventh. Because the decision of the Court below that the petitioners were not entitled to have a Bill of Exceptions under Rule 7 of the rules promulgated by the Supreme Court in criminal cases from the District Court to the Circuit Court of Appeals is erroneous, and is in conflict with the decision rendered in the case of *Boynken vs. Huff*, 121 Fed. (2d) 865, decided by the United States

Circuit Court of Appeals of D. C., and is in conflict with the decision of the Supreme Court in *Ray vs. U. S.*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976, and in the case of *Forte vs. U. S.*, 302 U. S. 223, 58 S. Ct. 180, 82 L. ed. 209.

—o—o—

PRAYER

Wherefore your petitioners, and each of them, pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered on its Docket No. 12531, Criminal, and entitled Hans Pete Mortensen and Lorraine Mortensen, Petitioners, vs. The United States of America, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court may be stayed and petitioners released on bail during the pendency of this appeal, and that the judgment herein may be reversed by this Court and for such other and further relief as to this Court may seem proper.

EUGENE D. O'SULLIVAN,
THOMAS W. LANIGAN, and
WILLIAM P. MULLIN,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1943

No. 559

HANS PETE MORTENSEN and LORRAINE MORTENSEN,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH DISTRICT.

REPLY BRIEF OF PETITIONERS

EUGENE D. O'SULLIVAN,
Of Omaha, Nebraska,

THOMAS W. LANIGAN,
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WILLIAM P. MULLEN,
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Counsel for Petitioners.

Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH DISTRICT.

REPLY BRIEF OF PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

On pages 10 and 11 of its brief the United States urges that the transportation in the instant case was such as is denounced by Section 1 of the Mann Act (18 U. S. C. A. 397) and discusses the cases bearing upon the question presented by petitioners.

On November 4th, 1943, the Circuit Court of Appeals for the Eighth Circuit decided the case of *Ellis vs. United*

States, which case appears in the Federal Reporter advance sheets of January 3, 1944 (138 Fed. (2d), p. 612), and same deals with the very question under discussion in the instant case and in principle that decision is in conflict with the decision in the instant case.

The first paragraph of the syllabus is as follows:

"Under statute forbidding transportation in interstate commerce of girl for immoral purposes, the gist of the offense is not ultimate immoral design but act of knowingly transporting or causing or aiding or assisting in transportation in interstate commerce of girl for such immoral design.—18 U. S. C. A. 398."

The second paragraph of the syllabus is as follows:

"Conduct of defendant, charged with having transported in interstate commerce girl for immoral purposes and with having conspired to commit such offense, is beyond Federal punishment, in absence of essential factor of interstate transportation in furtherance of immoral purposes.—Cr. Code 37, 18 U. S. C. A. 88; 18 U. S. C. A. 398."

In the opinion, at pages 613 and 614, it is stated:

"The question primarily before us in each appeal is whether there was sufficient competent evidence before the trial court to sustain a verdict of guilty (a) upon one or more of the first twenty-five counts, the sentences thereunder having been prescribed for concurrent service; and (b) upon the twenty-sixth count. This question involves certain issues touching the reception of testimony, and especially an examination of the evidence, which must be made with full understanding that the gist of the offense defined by 18 U. S. C. A. 398 is not the ultimate immoral design charged against the defendant, which, in its conception and achievement, is actually his major trans-

gression, but rather the narrow act of the knowing transportation or causing, or aiding or assisting in the transportation in interstate commerce of any woman or girl with such immoral design. Hoke v. United States, 227 U. S. 308, 320, 33 S. Ct. 281, 57 L. Ed. 523, 23 L. R. A., N. S., 906, Ann. Cas. 1913E, 905; Athanasaw v. United States, 227 U. S. 326, 332, 33 S. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911; Wilson v. United States, 232 U. S. 563, 571, 34 S. Ct. 347, 58 L. Ed. 728; Roark v. United States, 8 Cir., 17 F. 2d 570, 573; Drossos v. United States, 8 Cir., 16 F. 2d 833, 834; Tedesco v. United States, 9 Cir., 118 F. 2d 737, 741. So however immoral may be a defendant's conduct, it is beyond federal punishment in the absence of the essential factor of interstate transportation in furtherance of such conduct."

Respectfully submitted,

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Of Omaha, Nebraska,

THOMAS W. LANIGAN and
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Of Grand Island, Nebraska,
Attorneys for Petitioners.

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IN THE

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Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

EUGENE D. O'SULLIVAN,
Of Omaha, Nebraska,

THOMAS W. LANIGAN,
Of Grand Island, Nebraska,

WILLIAM P. MULLIN,
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Counsel for Appellants.

Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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Appellee.

BRIEF ON BEHALF OF APPELLANTS

OPINION BELOW

The opinion of the Court below which the appellants seek to reverse was rendered by the United States Circuit Court of Appeals for the Eighth Circuit on November 23, 1943, at St. Louis, Missouri (R. 79-83), affirming, by a divided Court, the conviction of appellants in the United States District Court for the District of Nebraska, Grand Island Division, in a jury trial had before Honorable James A. Donohoe, United States District Judge. In the Circuit Court of Appeals the case was heard before Circuit Judges Woodrough, Thomas and Johnsen, and the majority opinion was delivered by Circuit Judge Johnsen and

concurred in by Circuit Judge Thomas (R. 79 to 83), and a dissenting opinion was delivered by Circuit Judge Woodrough (R. 84).

The opinions of the Circuit Court of Appeals (R. 79-83 and R. 84) have not as yet been reported. No written opinion was rendered by the Trial Court.

GROUNDS UPON WHICH JURISDICTION INVOKED

The jurisdiction of this Court is invoked:

(a) Under that part of the 5th Amendment to the United States Constitution which in so far as applicable provides "that no person shall * * * be deprived of * * * liberty * * * without due process of law."

(b) Under that part of the 6th Amendment to the United States Constitution which in so far as applicable provides "that in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" made against them.

(c) Because this is a prosecution under the laws of the United States, to-wit, Sections 397 and 398 of 18 U. S. C. A., known as the Anti-White Slave Traffic Act, and involves a Judicial Construction of the scope, intent and meaning of these Statutes of the United States, and the jurisdiction over the alleged offenses is grounded upon knowingly transporting, causing to be transported, or aiding and assisting in obtaining transportation for, or in transporting a woman or girl, in interstate commerce, for the purpose of prostitution or debauchery, and the ultimate question presented and to be determined is whether or not a harmless and laudable circle vacation trip of a man and wife and two prostitutes, beginning

and ending at the same place in a State, but passing through other States enroute, is denounced by these Statutes and amounts to a violation of these Statutes, if prostitution for gain occurred in appellants' hotel between these women and men other than the defendant, both before and after the circle vacation trip was made.

(d) Because in passing upon the question presented by Subsection (c), infra, there is a direct conflict in the opinion in case of *U. S. vs. Wilson*, 266 Fed. 712, a District Court decision from the 6th Circuit, and the opinions in *Burgess vs. U. S.* (App. D. C.), 294 F. 1002; *Corbett vs. U. S.*, 299 F. 27, 9th C. C. A., and *U. S. vs. Winkler* (D. C., W. D., Tex.), 299 F. 834, and the instant case, and the later case of *Ellis vs. United States*, reported in the Federal Reporter advance sheets of January 3rd, 1944, 138 Fed. (2d) 612, decided by the U. S. Circuit Court of Appeals for the Eighth Circuit.

(e) Under the provisions of the 5th Amendment to the Constitution of the United States relating to due process of law, the failure and refusal of the Trial Court to give an instruction covering the defendants' theory of the case as shown by their evidence amounts to a denial of a constitutional right.

(f) Because the denial of a Bill of Exceptions to appellants by the Trial Judge, and the Circuit Court of Appeals is in direct conflict with the provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States relating to appeals in criminal cases from the District Court to the Circuit Court of Appeals, and is also in direct conflict with the decisions in *Boynken vs. Huff*, 121 Fed. (2d) 865, decided by the United States

Circuit Court of Appeals for the District of Columbia, and *Ray vs. U. S.*, 301 U. S. 158, 57 S. Ct. 700, 81 L. ed. 976, and *Forte vs. U. S.*, 302 U. S. 223, 58 S. Ct. 180, 82 L. ed. 209.

(g) Under Section 240(a) of the Judicial Code, as amended by the Act of February 13th, 1925, C. 229, Section 1, 43 Stat. 938, now Section 347(a), Title 28, U. S. C. A.

STATEMENT OF THE CASE

The appellants, who are husband and wife (R. 59), were indicted jointly in the District Court, as aforesaid, on an indictment returned on January 28th, 1941, containing two counts of which Count 1 (R. 1 and 2) charged that the defendants on September 4th, 1943, did unlawfully, wilfully, knowingly and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting, in interstate commerce, from Salt Lake City, Utah, to Grand Island, Nebraska, a certain named woman, for the purpose of prostitution and debauchery and with the intent and purpose to induce, entice and compel said woman to give herself up to debauchery and to engage in immoral practices; and Count 2 (R. 2) charged them with an exactly similar offense, except that a different woman was named as the person so transported.

The appellants filed a Plea in Abatement and Motion to Quash the Indictment (R. 3 to 6, incl., and R. 9); filed a written offer to prove certain facts (R. 7 and 8). The appellee demurred to these pleadings (R. 6 and 7), which demurrer was overruled (R. 11 and 12) and the Government was given leave to and did file an answer to the plea in abatement, in which was incorporated a demurrer

(R. 10), and after hearings thereon these pleadings were overruled (R. 11), exceptions were taken thereto and allowed by the Court (R. 11).

The indictment was and now is assailed upon the grounds that same did not plead facts but pleaded conclusions, was duplicitous, inconsistent, vague, indefinite and uncertain, and was not sufficiently informative so as to satisfy the requirements of the 5th and 6th Amendments to the United States Constitution, by according them due process of law and by advising the appellants of the nature and cause of the accusations made against them, and because each count of the Indictment embraced divers ways, means and manners in which White Slavery could be committed under the law, all of said ways, means and manners being connected up by the pleader by substituting the conjunctive "and" for the disjunctive "or," used in the statute.

Although the Plea in Abatement and the Motion to Quash did not specifically urge that the Indictment was defective for the reasons referred to above (R. 3-6 and R. 9), the Motion of the Defendants to Dismiss the Action and Discharge the Jury (R. 23, paragraphs a, b, and c) did direct the attention of the Trial Court to same and these questions were definitely presented to the Circuit Court of Appeals in the Assignment of Errors (R. 35, paragraphs 11, 12, 13, 14, 15, and 16; R. 36, paragraphs 11, 12, 13, 14, 15, and 16) and the Circuit Court of Appeals entertained the question and specifically ruled adversely to appellants' contentions.

It was the contention of the appellants, as disclosed by the Plea in Abatement and Motion to Quash (R. 3-6) and the offer to prove (R. 7-8), which matters were ad-

mitted by the Demurrers of the appellee (R. 6-7), that the facts relating to interstate transportation did not bring this case within the purview of Sections 397 and 398 of 18 U. S. C. A., the Anti-White Slave Traffic Act, because the actual transportation of these two women was from a point in the State of Nebraska, to-wit, Grand Island, to the same point in the State of Nebraska, and that the transportation of the appellants and these two women through other states was for the purpose and intention of taking a circle vacation tour, or trip, and it was not the intentional transportation denounced by the law, and that the Government, in order to make a case on paper, had selected Salt Lake City, Utah, as the starting point of the transportation, which city was merely one of the cities which the parties had passed through on the circle vacation trip on their way back home.

In line with appellants' theory of the case counsel for the appellants requested, and the Trial Court refused to give, the following instruction, to which refusal an exception was taken and allowed by the Court (R. 14):

> "If you find from the evidence that the vacation trip in question commenced at Grand Island, Nebraska, and that the final destination was Grand Island, Nebraska, and the states of Colorado, Wyoming and Utah were incidentally gone through, you are instructed that the White Slave Traffic Act specifically provides that the words 'interstate commerce' as used in the Act shall include transportation from one state to another state. This definition necessarily excludes by implication transportation from one point in a state to the same point within the same state, and if you so find, then you shall bring in a verdict of not guilty as to both defendants on each count of the indictment."

Thereafter pleas of not guilty were entered (R. 11 and 12), a trial was had (R. 11 and 12), and after all of the evidence had been submitted a written Motion to Dismiss was filed (R. 23 to 25, incl.), same was overruled, and upon argument and submission, the jury returned a verdict of guilty on both counts (R. 13), and each of said parties received a sentence of 3 years imprisonment on each of the two counts of the Indictment, said sentences to run concurrently, and Hans Pete Mortensen was also sentenced to pay a fine of $500.00 on each of said two counts (R. 14 to 16).

Later a Motion for a New Trial was filed and overruled (R. 16 to 22, incl.), Notices of Appeals were filed R. 30, 31), Bail and Cost Bond were posted (R. 26 to 30, incl.).

Thereafter, pursuant to the provisions of Rule 7 of the Rules of Procedure in Criminal Cases promulgated by the Supreme Court, the Clerk notified the Trial Judge of the filing of the Notices of Appeal (R. 45), but the Trial Judge did not *at once* notify the respective attorneys to appear before him, so as to give directions to counsel with respect to making up the record on appeal (R. 45, 46), and said attorneys were never notified pursuant to the provisions of Rule 7, so to do, until 2 days after the statutory 30-day period had expired (R. 32, 33), and then the Trial Court denies the appellants the right to a Bill of Exceptions (R. 42, 43, 50, 51), but permitted an appeal to be taken on the Transcript alone, pursuant to Rule 8 of the Rules promulgated by the Supreme Court (R. 43, 44).

Thereafter application was made to the Circuit Court of Appeals for the Eighth Circuit to allow appellants a Bill of Exceptions, and both a showing (R. 53-71) and

counter showing (R. 72-76) was made, and after arguments of counsel were had the petitioners were again denied a Bill of Exceptions (R. 77).

In appellants' brief filed in the Circuit Court of Appeals the matter of the denial of a Bill of Exceptions to them was again urged as error and this matter was argued to the Court, but same was to no avail (Opinion footnote, R. 81).

A reading of this footnote to the majority opinion of the Circuit Court of Appeals (R. 41) discloses a very unusual way of handling and considering this question. The record was unofficially read, judgment was passed thereon, and no opportunity was afforded these appellants to have a review by this Court of this official finding made from an unofficial record.

It is our contention that these questions are presented to the Court for determination:

(a) Does an Indictment whose allegations are not only in the language of the Statute, but which embraces in each count thereof, by use of the conjunctive "and," divers ways, means and manners in which an offense may be committed under the Statute, some of which are inconsistent with others, satisfy the constitutional requirements under that part of Article 5 of the Amendments to the United States Constitution relating to due process of law, and that part of the 6th Amendment to the United States Constitution relating to the right of an accused to be informed of the nature and cause of the accusation made against him, and is such an indictment in each of its counts vulnerable to the claim that it pleads conclusions instead of facts and is vague, indefinite and uncertain and duplicitous?

(b) Do Sections 397 and 398, Title 18, of the United States Anti-White Slave Law, as follows—

"397. WHITE-SLAVE TRAFFIC; TERMS DEFINED. The term 'interstate commerce,' as used in this section and sections 398 to 404 of this title, shall include transportation *from* any State or Territory or the District of Columbia *to* any other State or Territory or the District of Columbia."

"398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES. * * * Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, * * *, any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."

define and denounce as an offense against the United States a state of facts where persons take prostitutes employed in their hotel on a circle vacation trip and incidentally on said trip going and coming home pass through several states, and can the Government ignore the real beginning of the transportation and of its own accord select a starting point of their own choosing, which was the place where the parties started back on their homeward journey?

(c) Can the real intent to take these prostitutes on a vacation trip be ignored and another intent be conjured up by the law enforcing authorities, because of the fact that prostitution occurred both before and after the circle vacation trip was taken?

(d) Is it proper for a Trial Judge in a District Court of the United States to refuse to give, upon the

request of the defendants, an instruction to the trial jury covering their theory of the case?

(e) Can defendants, who seek to appeal from their conviction in the District Court of the United States, be deprived of a Bill of Exceptions on said appeal because of the failure of the Trial Judge to comply with the mandatory provisions of Rule 7 of the Rules promulgated by the Supreme Court of the United States for such appeals in criminal cases, from the District Court of the United States to the Circuit Court of Appeals of the United States, which rule is as follows:

> " 'The Clerk of the trial Court shall *immediately* notify the trial judge of the filing of the Notice of Appeal, and *thereupon* the trial judge *shall at once* direct the appellant or his attorney and the United States Attorney, to appear before him *and shall give such directions* as may be appropriate with respect to the preparation of the record on appeal, including direction for the purpose of making promptly available all necessary transcripts of testimony and proceedings.' "

(f) Is it an abuse of discretion on the part of a Trial Judge of the United States District Court and of the Circuit Court of Appeals to deny appellants a Bill of Exceptions when the failure to procure one was due to the fact that the Trial Judge, although setting the place for the meeting of counsel for the purpose of giving directions relating to the making up of a Bill of Exceptions, did not "at once" set the date of said meeting, but delayed setting the date until 2 days after the statutory 30-day period had expired?

(g) Under Rule 4 of the Rules Promulgated by the Supreme Court of the United States in reference to

criminal appeals from the District Court to the Circuit Court of Appeals, it is provided:

> "'From the time of the filing with its Clerk of the Duplicate notice of appeal, the Appellate Court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.'"

Was it not the duty of the Circuit Court of Appeals under that portion of Rule 4 to permit a Bill of Exceptions in a case such as the instant case?

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in not holding that the Indictment was a nullity, in that it is pleaded conclusions instead of facts, was duplicitous, inconsistent, vague, indefinite and uncertain and therefore violative of the 5th and 6th Amendments to the United States Constitution, in that it did not sufficiently advise the petitioners of the nature and the cause of the accusation made against them.

2. The Circuit Court of Appeals, in the majority opinion, erred in not holding that the facts in the instant case did not fall within the purview of The United States White Slave Law, 18 U. S. C. A., Sections 397 and 398, because the transportation which actually took place was not transportation in interstate commerce within the intent or meaning of the law—that is, transportation from a point in one state to a point in another state, but was a transportation from Grand Island, Nebraska, to Grand Island, Nebraska, and the touring through other states on the circle vacation trip was a mere incident to the through transportation and not transportation from one

state to another—the transportation denounced by the law.

3. The Circuit Court of Appeals, in the majority opinion, erred in ignoring the real starting point of the transportation and permitting the Government to select in its place and stead an intermediate city through which the parties incidentally happened to pass while enroute on a circle vacation trip.

4. The Circuit Court of Appeals, in the majority opinion, erred in not holding that if the petitioners at the time, and prior to leaving Grand Island, Nebraska, had no intent to transport said two women in interstate commerce for immoral purposes, but left on a vacation tour, then petitioners did not violate Sections 397 and 398 of Title 18, U. S. C. A., regardless of what immoral acts said women may have committed upon their return to Grand Island, Nebraska.

5. The Court erred in refusing to give the aforesaid instruction requested by the petitioners because same, aside from stating the law correctly, covered their theory of the case.

6. The Circuit Court of Appeals erred in refusing to permit petitioners to have a Bill of Exceptions.

ARGUMENT

Point I.

We contend that this Indictment in each of its two counts is duplicitous, inconsistent and a nullity. It charges four different offenses in each count, to-wit, that the defendants *did transport, did cause to be transported, did aid and assist in obtaining transportation* and *in transporting* in interstate commerce the women in question. These ways or means are improperly placed in one count, together with the language, "with the intent and purpose to *induce, entire* and *compel*, etc.

That by reason of said duplicity each of said counts contain matters which are inconsistent with other portions of the same count, and also said Indictment expressly violates the provision of Sec. 557, Title 18, U. S. C. A., which will be quoted later.

The law upon which this prosecution is grounded does not use the conjunctive AND but the disjunctive OR in reciting these separate, distinct and inconsistent ways or means of committing the offenses, but the pleader does not use the disjunctive OR, but instead uses the conjunctive AND. To draft the Indictment in the way and manner in which it is drawn and put the defendants on trial on same is contrary to the laws of the United States and to certain provisions of the Constitution of the United States and Amendments thereto, particularly United States Constitutional Amendments 5 and 6, and that portion of Section 8 of Article I of the said Constitution, which exclusively empowers the Congress of the United States to make all laws necessary and proper to carry into execution all of the Powers of Government, and to create and define criminal offenses and to provide punishment therefor. By alleging disjunctives in the law as con-

junctives in the Indictment it amounts to an Amendment of the law by the United States Attorney and violates the right of the defendant to have the charge against him made in the language of the statute or in words of similar import, and denies him the right to have each charge made separately, and not all charges under the law made against him en masse. To make said charges in the way and manner stated in the two counts of the Indictment amounts to a denial of due process of law as guaranteed to the defendant under the 5th Amendment to the United States Constitution and to a denial of defendants' rights under the 6th Amendment to the Constitution of the United States which requires a defendant to be informed of the nature and cause of the accusation against him, without evasion and with precision and certainty.

It is not stated specifically in any of the two counts of the Indictment whether the charge was based on the theory that the defendants *did transport, did cause to be transported, did assist in obtaining transportation for, or in transporting* or whether the intent and purpose was to *induce, entice* or *compel* the women to be transported in interstate commerce, all of which means different things.

The intent and purpose are necessary and essential elements of the offenses created by Section 398 of Title 18, U. S. C. A., upon which this Indictment is predicated. There is no sufficient or proper allegation in the Indictment alleging any intent or specific intent but merely a blanket charge of a general and unspecified intent which might be one of the three but probably not all of the intents alleged, and this also amounts to a violation of the defendants' right to be accorded due process of law as guaranteed by the 5th Amendment to the United States

Constitution and is also violative of that portion of the 6th Amendment to the United States Constitution which in so far as applicable provides that the accused shall have the right to be informed of the nature and cause of the accusation made against him.

This Indictment in its two counts, and each of said counts, fails to allege the offenses attempted to be pleaded in the language of the statute or in language of similar import as that contained in the portion of the law creating and defining the said offense, to-wit, Section 398 of Title 18, U. S. C. A., because the pleader uses AND for OR without any legislative authority.

The Indictment in its two counts fails to plead sufficient facts so as to bring the matters alleged within the law and to inform this defendant with sufficient particularity and certainty as to the precise charge attempted to be made against him and fails to disclose to the defendant the necessary and proper facts relative to the claimed commission of the alleged offenses charged in each of said counts and contains mere conclusions and does not plead facts, and also the allegations are vague, indefinite and uncertain and do not state sufficient facts or circumstances tending to identify the particular manner in which the offense was committed.

At the outset it might be urged that because of the failure on the part of the appellants to challenge precisely the sufficiency of the indictment in the preliminary pleadings, to-wit, the Plea in Abatement and the Motion to Quash (R. 3-6, 9), and called the attention of the Court to same for the first time in paragraphs a, b, and c of the Motion of the Defendants to Dismiss the Action and Discharge the Jury (R. 23), that appellants have waived

their rights to now urge that the Indictment pleaded conclusions, was duplicitous, inconsistent, vague, indefinite and uncertain, and was not sufficiently informative so as to satisfy the requirements of the 5th and 6th Amendments to the United States Constitution.

Ordinarily that argument might be sound in a case where there are minor defects in an Indictment, but in the instant case we have an Indictment (R. 1-2) which is so inconsistent that it is in fact a nullity in the light of the 5th and 6th Amendments and the Court could never acquire jurisdiction to try this case. Again these Constitutional rights cannot be considered as waived and may be asserted at any time even after final conviction, sentence and imprisonment.

This Indictment could not be proved in toto and amounts to a charge in the alternative. The appellants either transported, or caused to be transported, or aided and assisted in obtaining transportation and in transporting. They were in one of the three categories.

It is elementary that one may not plead in the alternative. No cases need be cited to support that statement. If the disjunctive "or" used in the statute connected up these allegations, of course everyone could readily see that the pleading was in the alternative. Is the pleading any the less in the alternative if the conjunctive "and" is used to connect up inconsistent allegations? Does that way of pleading satisfy the provisions of the 5th and 6th Constitutional Amendments or is it null and void? Does the law contemplate that the Prosecuting Officer can amend the Congressional Act by substituting "and" for "or"? Is he bound to plead the statute as he finds it? If he can legally change "or" into "and"

why can't he change the rest of the context of the statute? Just because simple words—words of opposite meaning—are substituted does not make the doing thereof legal.

When a pleading like this is countenanced what happens? The Prosecutor changes the Congressional Act by substituting "and" for "or." The Trial Judge in instructing the Jury instead of requiring the Government to prove the charge as made in the Indictment has to change "and" back to "or," because if he did not do so the Jury, if they did their sworn duty, would be obliged to acquit the defendant. The jury must pick out any one of the three inconsistent ways referred to—they could not under the evidence find that all were proved beyond a reasonable doubt.

In *U. S. vs. Hunt* (C. C. A., Ill., 1941), 120 F. (2d) 592, it is stated:

> "An indictment charging two defendants in six counts of violating section 937, et seq., of this title, in causing two girls to be transported from one state to another for purposes of prostitution, which named date of trip, the girls involved, the mode of transportation, and object of transportation, using statutory terms, was sufficient, as against contention that indictment was too vague."

The Indictment in the instant case does not measure up to the standard of *U. S. vs. Hunt*, supra.

A perusal of each of the counts of the Indictment discloses that neither of them are sufficiently informative, specific, definite and certain as to satisfy constitutional requirements under the applicable portions of the 5th and 6th Amendments to the Constitution of the United States, there being an utter failure on the part of the

pleader to allege all of the essential facts such as the way, means or manner by which the alleged interstate transportation was accomplished or planned or contemplated, and there is also an utter failure on the part of the pleader to specifically allege whether or not said defendant *transported* or *caused to be transported in interstate commerce* or *aided and assisted in obtaining transportation* or *transporting* the women in question. The absolute failure to identify the particular offense attempted to be charged renders said Indictment a nullity. Any law or rule of law established by the Courts which authorizes, or pretends to authorize, an indictment such as was had in this case should be held to be unconstitutional, null and void for the reasons herein assigned.

We are familiar with the rule of law which has been applied in numerous cases, and that is,—that an indictment can follow the language of the statute and may contain a number of ways in which an offense could be committed, if the different ways are connected by the conjunctive "and" and not the disjunctive "or," but it is our contention that such a course of procedure can be followed legally, only when there is no inconsistency between any of the various ways it is alleged that the defendant employed to commit the offense. An indictment of murder could not charge in one count that the defendant shot, poisoned, choked, kicked, beat, speared, drowned and gassed the victim, thereby causing the victim to die and take pot luck on which would, upon the trial, fit the case from the standpoint of proof. Such pleading would never be proper for the reason that it would not be in the language of the statute and there would be a lack of directness. Such pleading would not only confuse a defendant, but would also confuse a jury if the case ever

went to the jury. The better reasoning suggests that every charge should be made with particularity, definiteness and directness and be such as to advise a defendant of the nature of the accusation. The charge in the instant case cannot be held to satisfy such requirements.

Section 557 of Title 18, heretofore referred to, states that "When there are several charges against any person for the same acts or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated."

The use of the word "may" in connection with permitting a joining of several such counts in one indictment should be construed to be mandatory and not directory, because if the pleader had to get legislative authority to put these counts in one indictment, then certainly he has no statutory or other authority to lump a number of counts together, some of them inconsistent, in one all-embracing count.

In *Roark vs. U. S.* (C. C. A., Colo., 1927), 17 F. (2d) 570, 51 A. L. R. 870, it is stated:

> "Distinct violations growing out of same transaction are separate offense. Transporting woman and inducing her to be transported for immoral purpose, though single transaction, constitute separate offenses."

In a civil case no pleader would contend that he did not have to state and number his various causes of action

or be consistent in his allegations. He would not have the audacity to put all of his separate claims, both consistent and inconsistent, in one cause of action.

Certain decided cases, such as *Crain vs. U. S.*, 162 U. S. 625, 40 L. Ed. 1097; *Conners vs. U. S.*, 158 U. S. 408, 39 L. Ed. 1033, and *Bridgeman vs. U. S.*, 140 Fed. 577, have encouraged criminal pleaders to become incorrect and obscure. These three cases hold that it is not error to charge that a defendant did an act and caused it to be done, etc., but I do not believe that a close reading of any of these cases would convince this Court that an Indictment such as the one in this case should be legally approved. It is just about the "omega" of license in criminal pleading.

In the case of *United States vs. Morris Behrman*, 258 U. S. 280, it is said in paragraph 2 of the syllabus:

> "It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation, and to plead the judgment, if one be rendered, in bar of a further prosecution for the same offense. If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent."

In the body of the opinion at pages 288 and 289 it is said:

> "It is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation, and to plead the judgment, if one be rendered, in bar of future prosecution for the same offense. If the offense be a

statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent. United States v. Smith, 2 Mason 143, Fed. Cas. No. 16,338; United States v. Miller, Fed. Cas. No. 15,775; United States v. Jacoby, 12 Blatchf. 491, Fed. Cas. No. 15,462; United States v. Ulrici, 3 Dill. 532, Fed. Cas. No. 16,594 (opinion by Miller, Circuit Justice); United States v. Bayard, 21 Blatchf. 287, 16 Fed. 376, 383, 384; United States v. Jackson, 25 Fed. 548, 550; United States v. Guthrie, 171 Fed. 528, 531; United States v. Balint, this day decided, 258 U. S. 250, ante, 604, 42 Sup. Ct. Rep. 301."

We submit that the indictment in the instant case does not measure up to these requirements.

Points II, III and IV.

It was the contention of the defendant at all times that the facts did not bring this case within the purview of the White Slave Traffic Act, and thus being violative of Sections 397 and 398 of Title 18, U. S. C. A., because it was intentional transportation from a point within Nebraska, to-wit, Grand Island, to the same point within Nebraska, and that the passing through other states was an incident only to the circle vacation tour and was not a transportation from one state to another (*U. S. vs. Wilson*, 266 Fed. 712). The defendant further contended that if the Government had alleged the true facts in the Indictment that the Indictment would not have charged a crime under Section 398 of Title 18, U. S. C. A., and therefore the defendant, in order to avoid the expense of a trial, offered to prove the true facts, which were known to the prosecution when the Indictment was prepared.

The Government, by its Demurrers, admitted the truth of the matters alleged in the offer to prove this Indict-

ment is a skillful circumvention of the law and an adroit evasion of the letter and spirit of the law.

The pertinent portions of the statute for the purpose of this inquiry are as follows:

> "397. WHITE-SLAVE TRAFFIC; TERMS DEFINED. The term 'interstate commerce,' as used in this section and sections 398 to 404 of this title, shall include transportation *from* any State or Territory or the District of Columbia *to* any other State or Territory or the District of Columbia."
>
> "398. TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES. * * * Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate commerce, * * *, any woman or girl for the purpose of prostitution or debauchery, * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the Court."'

This statute contemplates a starting point in one state, as is indicated, and a destination in another state, and does not contemplate that the starting point and the destination or ending of the transportation could both be in the State of Nebraska, the same state where the contemplated trip, according to the intention of the parties, was to have its beginning and its ending. If this sort of a situation was contemplated by Congress when the Act was passed, then the language of the statute would so indicate. The Court has no authority to read into this statute something which the lawmakers did not specifically put there. This is a criminal statute and as such, under the well-known and uniform holdings, it must be construed strictly.

The facts which the Government admitted by its Demurrers to the Plea in Abatement and Motion to Quash are as follows (R. 7-8):

> "That the appellants are husband and wife, and reside at Grand Island, Nebraska, and have been such residents for more than two years last past; that in August, 1940, appellants were contemplating a summer vacation circle trip from Grand Island through several western states, and to return to their home in Grand Island when they had finished their vacation and sightseeing; that Margaret Smith and Doris McMahon, alias Goldie Wright, named in the first and second counts of the indictment, were residents of Grand Island, Nebraska, and proposed to the defendants that they accompany defendants on the vacation trip to the mountains and pay their own expenses; that the defendants agreed to this arrangement, and the two girls named in the Indictment accompanied the defendants on the vacation circle trip and paid their own expenses; that on or about the 22nd day of August, 1940, the defendant and the two girls named in the Indictment left Grand Island, proceeding through Wyoming, Utah and Montana, and returning several days later by way of Colorado to Grand Island; that no immoral acts were committed by any of the parties on the trip and that the only intent and purpose was for a vacation, with no intent to violate Section 398 of Title 18, U. S. C. A., or any other Federal Statute, for the purpose of prostitution or debauchery, or with the intent or purpose to induce, entice and compel said girls to give themselves up to debauchery, or to engage in immoral practices, all of which was well known to the Government officials in charge of the prosecution at the time of the returning of the Indictment."

In *U. S. vs. Wilson*, 266 Fed. 712, opinion by Judge Sanforth, the defendant was indicted on a charge of violating the White Slave Traffic Act, tried, found guilty,

and judgment of imprisonment pronounced upon him. No question as to whether or not the law denounced the acts in question was raised before or at the trial; however, shortly thereafter the question having arisen in the mind of the Court, he requested briefs on the question involved.

The indictment and proof showed that the woman in question was transported in interstate commerce from Nashville, Tennessee, through the State of Tennessee and by way of Stevenson, Alabama, into Hamilton County, Tennessee, over the lines of Nashville, Chattanooga & S. S. Railroad Company.

The White Slave Traffic Act specifically provides that the words "interstate commerce," as used in the Act, shall "include transportation from one state * * * to another state." This definition necessarily excludes, by implication, transportation from one point in a state to another point in the same state. In interstate commerce, the words "from" and "to," as used in the Act, manifestly refer to two different states as the *respective points* of *origin* and *final destination* of the *transportation;* and not a state through which the woman is carried as a *mere incident* to the through transportation.

The proof showed a transportation from Nashville, Tennessee, to Chattanooga, Tennessee, with merely incidental passage through Alabama and not a transportation from Alabama to Tennessee, within the meaning of the Act.

> "*Held:* Indictment insufficient under true construction of Statute, and judgment set aside."

In *U. S. vs. Grace,* 73 Fed. (2d) 204:

The defendant was charged with transporting a young woman in interstate commerce from the Eastern District

of New York to Washington, D. C., for the purpose of prostitution and debauchery and other immoral purposes.

The evidence showed that the complainant came from Philadelphia to Brooklyn with her Bishop to give testimony at an ecclesiastical trial over which appellant presided. Later she rode back from Brooklyn to Philadelphia, through New Jersey, with appellant, his chauffeur driving, and that appellant attempted to have intercourse with her on floor of car going through New Jersey, but unsuccessfully. They remained in Philadelphia two weeks, during which time appellant took immoral liberties with her, but did not have intercourse with her. He then asked her to go to Baltimore, Maryland, with him, where they remained a short time, but appellant did not have sexual relations with her. Later they went to Washington, D. C., to appellant's home, where she did have sexual relations with him.

> "*Held:* That in order to constitute the offense charged, there must be substantial evidence that the intention to transport the woman for immoral purposes must have been formed by the parties before they reached the foreign state."

The statute makes the intent and purpose an element of the crime, and if the journey was planned with no immoral purposes at the time, no crime was committed, no matter what may have occurred thereafter. It is the immoral purpose which renders interstate commerce criminal. The immoral relationship, standing alone, unconnected with interstate commerce, does not violate the Act.

Inducing the girl to go from one state to another with any other purpose, except formed immoral intent at the outset, is insufficient to constitute a violation of the White Slave Law.

We have the simple situation of the trip being undertaken for legitimate purposes, and the immoral purpose, intent and relations arising after the transportation, so that the purpose and intent were not present before or during the transportation.

In *Sloan vs. U. S.*, 287 Fed. 91, it is stated:

> "that since the White Slave Traffic Act is valid only under the commerce classification of the National Constitution, Art. 1, Sect. 8, Clause 3, there must, in order to constitute the offense charged, be substantial evidence that the intention to transport the woman for immoral purposes was formed by the parties before they reached the foreign state to which she was transported, since the immoral act itself is exclusively within the jurisdiction of the police power of the state where it was committed."

The Court further held that the intent must arise before the transportation. This is a perfectly sound rule. In this case the defendant took the woman involved to St. Louis to visit her sister, and it was only after their arrival there that the matter of immoral relations arose. There is no question about the correctness of the Court's holding.

In *Drossos vs. U. S.*, 16 Fed. (2nd) 833, it is said:

> "No crime is committed unless the interstate transportation of the female was planned and made with immoral purpose."

The woman involved was threatened by her husband, who had stated that he would kill her if he found her at their home when he returned from work. Under this threat she left home with her small children and called on the defendant, a family friend. Defendant took her

to another state with the thought and intention that they would be married and live together there. There was no consideration of any illegal relations before or at the time the trip was made. After the trip was completed and the parties, who apparently were of foreign extraction, and not familiar with the laws of this country, learned that they could not be married because she already had a husband, so they began living together. Under these facts it was disclosed that the purpose and intent of immoral relations arose after the transportation had been completed, and not before the transportation, and it was held that the White Slave Act had no application to this state of facts.

In *Biggerstaff vs. U. S.* (C. C. A., 8th Circuit), 260 Fed. 926, it is stated:

> "A violation of the act requires that the transportation shall be for an immoral purpose and the mere commission of an immoral act by defendant while on the interstate journey with a woman for a lawful purpose does not, where the immorality was merely casual, constitute a violation of the act."

In *Alpert vs. U. S.* (C. C. A., N. Y.), 12 Fed. (2nd) 352, the Court said:

> "The journey from one state to another if followed by illicit intercourse does not result in violating the act where the journey was made for a wholly different reason."

In *Fisher vs. U. S.* (C. C. A., West Va., 1920), 266 Fed. 667, it is stated:

> "The transportation in interstate commerce must have for its object, or be the means of effecting or at least facilitating the sexual intercourse of the par-

ties. If the journey was for other reasons to which intercourse was not related the interstate transportation and eventual sexual intercourse cannot be regarded as a violation of the White Slave Act."

In the case of *Van Pelt vs: U. S.*, 240 Fed. 349, where a pregnant girl requested defendant to take her from Washington, D. C., to Baltimore, so that she might go into seclusion during her approaching confinement, and he did so, and made the arrangements and gave her more than enough money to pay the transportation and accompanied her to her destination, the Court, at page 349 of the opinion, said:

"There can be no doubt that the girl was brought to Baltimore in order that she *might* go into *seclusion*. The defendant may have *anticipated* that he would gratify his desire, as he doubtless would have done had the trip never *taken place*, but *there is no evidence that such anticipation played any part whatever in inducing him to arrange for her coming to Baltimore.*"

Again, on page 348 of the opinion, the Court said:

"Before he could be convicted the evidence *must show that he took* a hand in *procuring* the transportation for the *particular purpose charged* in the *indictment.*"

In *Shama vs. U. S.*, 94 Fed. (2d) page 1 (Certiorari denied 304 U. S. 568), it is held that an immoral purpose first conceived at the end of a journey is not sufficient under Section 398 of Title 18, U. S. C. A., to constitute a crime.

It is the inducement and transportation, not the subsequent conduct, which constitutes an offense under Section 398 of Title 18, U. S. C. A.

In *Coltabellotta vs. U. S.* (C. C. A., N. Y., 1930), 45 F. (2d) 117, it is stated:

> "To constitute a violation of this section there must exist a present intent to transport the female in interstate commerce for immoral purposes."

In *Hunter vs. U. S.* (C. C. A., Va., 1930), 45 F. (2d) 55, it is stated:

> "A conviction for a violation of this section requires a showing that the purpose in transporting the woman in interstate commerce was to have sexual intercourse with her."

In *Ghadiali vs. U. S.* (C. C. A., Or., 1927), 17 F. (2d) 236, certiorari denied (1927), 47 S. Ct. 660, 274 U. S. 747, 71 L. Ed. 1328, it is stated:

> "A secretary may be transported in interstate commerce without a violation of sections 397 to 404 of this title in the absence of a purpose to have sexual intercourse."

In *Yoder vs. U. S.* (C. C. A., Okla., 1935), 80 F. (2d) 665, it is stated:

> "Under the statute the prospect of sexual relations must have some relation to and be one of the reasons or purposes of the trip; but, if the sole purpose of the trip is legitimate, purely incidental intent to have intercourse is not a federal offense."

On November 4th, 1943, the Circuit Court of Appeals for the Eighth Circuit decided the case of *Ellis vs. United States*, which case appears in the Federal Reporter advance sheets of January 3, 1944 (138 Fed. (2d), p. 612), and same deals with the very question under discussion in the instant case and in principle that decision is in conflict with the decision in the instant case.

The first paragraph of the syllabus is as follows:

"Under statute forbidding transportation in interstate commerce of girl for immoral purposes, the gist of the offense is not ultimate immoral design but act of knowingly transporting or causing or aiding or assisting in transportation in interstate commerce of girl for such immoral design.—18 U. S. C. A. 398."

The second paragraph of the syllabus is as follows:

"Conduct of defendant, charged with having transported in interstate commerce girl for immoral purposes and with having conspired to commit such offense, is beyond Federal punishment, in absence of essential factor of interstate transportation in furtherance of immoral purposes.—Cr. Code 37, 18 U. S. C. A. 88; 18 U. S. C. A. 398."

In the opinion, at pages 613 and 614, it is stated:

"The question primarily before us in each appeal is whether there was sufficient competent evidence before the trial court to sustain a verdict of guilty (a) upon one or more of the first twenty-five counts, the sentences thereunder having been prescribed for concurrent service; and (b) upon the twenty-sixth count. This question involves certain issues touching the reception of testimony, and especially an examination of the evidence, which must be made with full understanding that the gist of the offense defined by 18 U. S. C. A. 398 is not the ultimate immoral design charged against the defendant, which, in its conception and achievement, is actually his major transgression, but rather the narrow act of the knowing transportation or causing, or aiding or assisting in the transportation in interstate commerce of any woman or girl with such immoral design. Hoke v. United States, 227 U. S. 308, 320, 33 S. Ct. 281, 57 L. Ed. 523, 23 L. R. A., N. S., 906, Ann. Cas. 1913E, 905; Athanasaw v. United States, 227 U. S. 326, 332, 33 S. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911;

Wilson v. United States, 232 U. S. 563, 571, 34 S. Ct. 347, 58 L. Ed. 728; Roark v. United States, 8 Cir., 17 F. 2d 570, 573; Drossos v. United States, 8 Cir., 16 F. 2d 833, 834; Tedesco v. United States, 9 Cir., 118 F. 2d 737, 741. So however immoral may be a defendant's conduct, it is beyond federal punishment in the absence of the essential factor of interstate transportation in furtherance of such conduct."

The following well chosen language taken from the minority opinion in this case by Circuit Judge Woodrough, perhaps analyzes more clearly and distinctly the true legal aspect better than the writers of this brief could do:

"Recognizing, as the record requires, that the business at appellants' house in Grand Island, Nebraska, was carrying on prostitution, I think there is a fallacy in spelling a crime out of the act of taking the inmates away from their place of prostitution and stopping it for the two weeks' period of vacation travel. In the Mann Act Congress has exercised its powers in the field of interstate commerce to prevent transportations in interstate commerce in furtherance of sexual immorality. I do not think its provisions contemplate, or can be extended to transportations that are not in furtherance and have nothing to do with sexual immorality except to interrupt and stop its practice for a period. The law has been on the books a long time and none of the cases cited appears to me to lend support to the affirmance. Wilson vs. United States, 266 F. 712, is to the contrary, so far as it is in point. But there the transportation may have been in furtherance of the immoral practices, and I do not rely on it. It seems obvious to me that aiding prostitutes to travel away from their foul environment for even a short vacation period is not evil conduct and that it is not the intent of the Act to make it criminal. Splitting the round trip into two transportations, innocent while outward bound but criminal on the homeward lap, seems to me a men-

tal operation that reflects ingenuity for the prosecutor rather than fair application of the Act to what the appellants did.

"I can discern only one intent of all the parties of the trip, and that was to take a vacation. They went away with that intent and held to it till they got back. The penitentiary sentences imposed upon these appellants for doing that and nothing more seem to me erroneous."

Point V.

If the view taken by Circuit Judge Woodrough, in the minority opinion, is correct, then the requested instruction refused by the Court, heretofore quoted verbatim, should have been given by the Court, because it covered correctly the defendants' theory of the case.

Point VI.

We feel that this Court should reconsider and reverse the ruling made at Kansas City, Missouri, on March 24, 1943, in which the Application of Appellants for leave of Court to have a Bill of Exceptions and to extend the time for serving, settling and filing same was denied (R. 53-78). At the time of this hearing a copy of the Transcript of the Evidence produced upon the jury trial and the Trial Court's instructions to the jury were not filed with the Court for it to consider, along with the application, affidavits and exhibits shown at pages 53 to 77 of the Record presented to this Court, but when the matter was passed upon at St. Louis, Missouri, and the majority opinion of the Circuit Court of Appeals was delivered in this case, same was read and considered by the Court (R. 81, Footnote 1). By not being permitted to have a Bill of Exceptions the appellants were prevented from urging and arguing certain of the Assignments of Error which they wished to urge.

It is our contention that these appellants should not have been penalized by not being allowed to have a Bill of Exceptions when both counsel for appellants and the Court were at fault—counsel in not getting an extension of time before 30 days had expired and the Court for not calling the meeting of counsel for the purpose of giving directions relating to the preparing of the Record in the case within 30 days.

Rule 7 of the Rules of Procedure in Criminal Cases states that:

> "The Clerk of the trial Court shall *immediately* notify the trial judge of the filing of the Notice of Appeal, and *thereupon* the trial judge *shall at once* direct the appellant or his attorney and the United States Attorney, to appear before him *and shall give such directions* as may be appropriate with respect to the preparation of the record on appeal, including direction for the purpose of making promptly available all necessary transcripts of testimony and proceedings."

The Clerk acted promptly in the premises.

This rule makes it mandatory for the Clerk to notify the Judge *immediately* and *thereupon* the Trial Judge *shall at once direct* counsel to appear and *shall* give such directions, etc. Does this rule contemplate that the Judge shall set the place of the meeting and hesitate to set the time without consulting appellants' counsel, and invite defense counsel to set a date best suited to his convenience, as the Judge's letter at pages 45 and 64 of the Record discloses?

Counsel for appellants then replied to the Judge's letter and, among other things, told the Court: "I would suggest that you set a date" (Tr. p. 47).

The Judge's Secretary then on February 1, 1943, advised counsel that the Trial Judge "is in the hospital with a bad cold but is expected to return to the office within a few days" (R. 47-48).

Appellants' counsel waited for a date to be set for the meeting and was lulled into security. No answer was given to his inquiry about the length of time he had in which to file his Bill of Exceptions (Tr. p. 47). He was cited to rules (Tr. pp. 47, 48). Then he received notice to appear on February 26, 1943, for the meeting under Rule 7, which was two days after the expiration of the 30-day period. Does this sound fair? Was this notice of the Judge's sent out at once as provided for by Rule 7? Were appellants entirely at fault? No other answers could be truthfully made to these inquiries except in the negative.

The first case decided upon the question presented under this point was *Wolpa vs. U. S.*, 84 Fed. (2d) 829. It was decided on July 20, 1936, by the Circuit Court of Appeals for the Eighth Circuit, but is not in point, as far as this case is concerned. The case of *Ray vs. U. S.*, 301 U. S. 162, was decided April 26, 1937.

The Court said in this case that "The rule presupposes that the Trial Judge, who is familiar with the proceedings on the trial, is in a position to estimate the length of time necessary for the preparing and the filing of the Bill of Exceptions and that the Judge is permitted, within 30 days after the taking of the appeal, to fix the time for the serving, settling and filing of same."

Rule 4 of the Rules of Criminal Procedure provides:

"RULE 4. CONTROL OF APPELLATE COURT.

"The Clerk of the trial court shall immediately forward the duplicate notice of appeal to the Clerk of the Appellate Court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

"From the time of the filing with its Clerk of the duplicate notice of appeal, the Appellate Court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

"The Appellate Court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail."

The rule specifically gave the Circuit Court of Appeals full authority to set aside or modify the Trial Judge's order *whenever it appears* that there has been an abuse of discretion or *that the interest of justice require it.*

The rule provides for the correction of any miscarriage of justice in this respect.

Did the Trial Judge ever, within 30 days, fix the time for the serving, settling and filing of the Bill of Exceptions in this case? Certainly he did not do so, and that fact is unmistakably and clearly shown by the record. What the Trial Judge really did was done 28 days after the filing of the Notice of Appeal. He directed counsel to appear in Chambers, at Omaha, Nebraska, within the 30-day period and in doing so he fixed the date of the meeting of counsel 2 days after the 30-day period had expired, and consequently this procedure resulted in the appellants being denied their rights to have a Bill of Ex-

ceptions in this case. Certainly that cannot be regarded as a reasonably fair compliance with Rule 7 because the Trial Court was required under Rule 7 to set the date of his meeting with counsel "at once" after being advised of the Appeal by the Clerk.

In *Boynken vs. Huff*, 121 Fed. (2d) 865, the Trial Judge settled the Bill of Exceptions at a time beyond the time allowed and a Motion to Strike the Bill of Exceptions was denied by the Circuit Court of Appeals.

The Court further stated that the letters in this case between the defendant and the Trial Judge are set out. The defendant had no counsel on appeal. Judge Rudlige said on page 873: "*The initiative* in matters relating to preparations of the record is on the trial judge or clerk of the trial court." Under Rule 7 it is made the duty of the Judge to *act at once* and *direct* appellant or his attorney and the United States Attorney to appear before him and give instructions. This was not done in this case. The only rule which specifies a particular time limit is that part of Rule 9 which sets the time to be 30 days after the appeal. *But neither this nor any other requirement subsequent to taking the appeal can be regarded as jurisdictional* in the light of *Forte vs. U. S.* (1937), 302 U. S. 223, where the Court said: "*from the time of taking the appeal the court of appeal has complete supervision and control of the proceedings on the appeal including proceedings relating to the preparation of the record, * * * to vacate and modify any order made by the trial judge concerning prosecution of the appeal including the fixing of the time for settlement and filing of the Bill of Exceptions.*" This case cites and follows *Ray vs. U. S.*, 301 U. S. 158. The Court refused to strike the Bill of Exceptions settled out of time. No extension for settlement of the Bill of Exceptions had been given.

CONCLUSION

We submit that for the reasons stated herein, and each of them, that the Judgment of the lower Court should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 559

HANS PETE MORTENSEN AND LORRAINE MORTENSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 79–84) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 23, 1943 (R. 85). The petition for a writ of certiorari was filed on December 27, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of

the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial judge or the circuit court of appeals erred in denying petitioners' applications for an extension of time to present and settle a bill of exceptions.

2. Whether, assuming that the question is properly before the Court, the interstate transportation of prostitutes on the return portion of a vacation trip with the intent to have them resume the practice of prostitution in the brothel operated by petitioners was a violation of Section 2 of the Mann Act.

STATUTE AND RULES INVOLVED

Sections 1 and 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 397, 398), known as the Mann Act, provide in part:

> SEC. 1. The term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, * * *.
>
> SEC. 2. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or

debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Rules IV, VII, and IX of the Criminal Appeals Rules promulgated by this Court May 7, 1934 (292 U. S. 663–665), provide:

RULE IV. The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal. * * *

Rule VII. The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and

shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. The action and directions contemplated by this Rule may be had and given by the trial judge at any place he may designate within the judicial district where the conviction was had.

Rule IX. In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice. * * *

STATEMENT

Petitioners, who are husband and wife (see R. 59), were indicted in the United States District Court for the District of Nebraska in two counts

charging violations of Section 2 of the Mann Act (*supra*, pp. 2–3), in that they transported and caused to be transported and aided and assisted in obtaining transportation for and in transporting two women in interstate commerce from Salt Lake City, Utah, to Grand Island, Nebraska, for the purpose of prostitution and debauchery and with the intent to induce, entice, and compel the women to give themselves up to debauchery and to engage in immoral practices (R. 1–2). Petitioners filed a plea in abatement and a motion to quash the indictment (R. 3–6, 9) which were overruled (R. 11). After trial before a jury, petitioners were convicted on both counts (R. 13). Their motion for a new trial (R. 16–22) was overruled (R. 25–26), and on January 15, 1943, they were each sentenced to three years' imprisonment on each count, the sentences to run concurrently (R. 14–16). Petitioner Hans Pete Mortensen was, in addition, sentenced to pay a fine of $500 on each count (R. 15).

On January 18, 1943, petitioners filed a notice of appeal (R. 30). On January 22, the trial judge advised petitioners' attorneys by letter of his duty under Rule VII of the Criminal Appeals Rules to require the appearance of counsel before him for directions as to the preparation of the record on appeal, and requested the attorneys to fix a date for the appearance which would suit their convenience (R. 45–46). In response to the

judge's letter, petitioners' counsel asked for information as to the time within which the transcript and pleadings had to be filed in the circuit court of appeals and suggested that the judge fix his own date for the appearance of counsel (R. 46–47). In the temporary absence of the judge due to illness, his secretary wrote to petitioners' counsel on February 1, 1943, specifically calling their attention to Rules VII and IX of the Criminal Appeals Rules (R. 47–48). On February 23, 1943, the judge entered an order requiring the United States Attorney and petitioners' attorneys to appear on February 26, 1943 (R. 32–33). One of petitioners' attorneys appeared on that date (R. 58). On February 27, 1943, petitioners filed a motion for an extension of time to settle and file a bill of exceptions (R. 42). This motion was denied on the same date on the ground that no bill of exceptions had been settled and no extension of time granted during the period of thirty days following the filing of the notice of appeal (R. 42–43).[1]

Thereafter, petitioners filed an application in the circuit court of appeals for leave to settle and file a bill of exceptions (R. 53–76); this application was also denied (R. 77).

In an affidavit filed in support of the application to the circuit court of appeals, one of petitioners' attorneys stated that the object of the ap-

[1] The thirty-day period expired on February 24, 1943.

plication was to present the evidence relevant to petitioners' contention that the transportation proved at the trial did not fall within the interdiction of the Mann Act (R. 58). He stated that the transcript of the testimony would show that the two women named in the indictment were employed at petitioners' rooming house in Grand Island, Nebraska, and carried on prostitution therein; that when petitioners planned to visit Salt Lake City by way of Yellowstone National Park, the two women volunteered to accompany them in order to see the western scenery; that no acts of prostitution or solicitation occurred during the trip; and that after returning to Grand Island the women renewed their activities as prostitutes at petitioners' house (R. 59).

In order to assure itself that its prior denial of petitioners' application for an extension of time to settle and file a bill of exceptions would not result in a miscarriage of justice, the circuit court of appeals allowed petitioners' attorneys to submit a transcript of the evidence without any formal filing thereof (R. 81). The opinion of the court (R. 79–84) was directed to the question whether the return portion of the trip was a transportation in interstate commerce within the purview of the Mann Act. It held that such transportation constituted a crime under the Act and accordingly affirmed the convictions (R. 85), one judge dissenting (R. 84).

ARGUMENT

The principal question petitioners seek to raise here[2]—whether the return portion of a circular vacation trip is transportation in interstate commerce within the purview of the Mann Act—is not properly before this Court for the reason that petitioners did not procure the settlement and filing of a bill of exceptions setting forth the evidence showing the nature of the trip.

1. Petitioners urge (Pet. 7, 9–11, 12–13; Br. 26–30) that the trial judge and the circuit court of appeals were guilty of an abuse of discretion in denying their motions for an extension of time to present and settle a bill of exceptions. There is no merit in this contention. As shown in the Statement, *supra*, pp. 5–6, no bill of exceptions was settled and filed during the period of 30 days following the filing of the notice of appeal and no extension of time was requested or granted dur-

[2] Petitioners attack the indictment as duplicitous because it charges transportation, causing the transportation, and aiding and assisting in the transportation (pp. 6, 8, 11 of the amended petition, hereinafter designated as "Pet.," and pp. 10–16 of the brief in support of the original petition, hereinafter designated as "Br."). It is, however, well established that an indictment may properly charge conjunctively in one count the several acts condemned by the statute. *Blain* v. *United States*, 22 F. (2d) 393, 395 (C. C. A. 8); *Freed* v. *United States*, 266 Fed. 1012, 1014 (App. D. C.); see also *Crain* v. *United States*, 162 U. S. 625, 636; *Pines* v. *United States*, 123 F. (2d) 825, 829 (C. C. A. 8); *Troutman* v. *United States*, 100 F. (2d) 628, 631 (C. C. A. 10).

ing that period. The trial judge therefore had no authority under Rule IX of the Criminal Appeals Rules to grant petitioners' subsequent application for an extension of time.[3] The circuit court of appeals did have such authority,[4] but in the circumstances of this case its refusal to grant petitioners an extension was not an abuse of discretion and therefore not subject to review.[5] The attention of petitioners' counsel was specifically directed to the requirements of Rule IX, the language of which is so explicit that there can be no possible claim of misunderstanding. The courtesy of the trial judge in giving petitioners' attorneys an opportunity to fix a date for the appearance of counsel pursuant to Rule VII in no way excuses their failure to follow the clear mandate of Rule IX. They had ample time to settle a bill of exceptions or, at the very least, to apply for an extension of time within the 30-day period following the filing of the notice of appeal. (See R. 72–74.)

2. In order that this Court may assure itself, as did the circuit court of appeals, that no mis-

[3] *Ray* v. *United States*, 301 U. S. 158, 162; *Long* v. *United States*, 90 F. (2d) 482, 483 (C. C. A. 9), certiorari denied, 302 U. S. 730; *Wainer* v. *United States*, 87 F. (2d) 77 (C. C. A. 7), certiorari denied, 300 U. S. 669.

[4] *Kay* v. *United States*, 303 U. S. 1, 9–10; *Forte* v. *United States*, 302 U. S. 220, 223; *Ray* v. *United States*, 301 U. S. 158, 164.

[5] See *Ray* v. *United States*, 301 U. S. 158, 166–167.

carriage of justice will result from petitioners' failure to file a bill of exceptions, we shall discuss the question of petitioners' liability under the Mann Act as though the evidence in respect of the nature of the trip were before the Court.

Petitioners contend (Pet. 6–7, 8–9, 11–12; Br. 16–20) that since the initial and terminal point of the trip was Grand Island, Nebraska, the interstate transportation proved at the trial did not fall within the definition of interstate commerce in Section 1 of the Mann Act (18 U. S. C. 397) as transportation "from" one state "to" another. The sole authority upon which they rely is *United States* v. *Wilson*, 266 Fed. 712 (E. D. Tenn.), in which the court held that the crossing of state lines as an incidental part of a railroad journey from one point within a state to another point in the same state did not constitute interstate commerce under the Mann Act. The *Wilson* decision, however, is not in harmony with the general rule that even the incidental crossing of state lines constitutes interstate commerce,[6] and, as the court below pointed out (R. 81–83), it is contrary to the interpretation given to the term "interstate commerce" in other cases under the Mann Act[7] and in cases under the National Motor Vehicle

[6] *Hanley* v. *Kansas City Railway*, 187 U. S. 617; *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404, 408.

[7] *Corbett* v. *United States*, 299 Fed. 27 (C. C. A. 9); *United States* v. *Oriolo*, 49 F. Supp. 226 (E. D. Pa.).

Theft Act,[8] which contains a similar definition of interstate commerce.[9]

Petitioners also contend that the entire trip was motivated by the desire of petitioners and the women to take a vacation rather than a purpose to transport the women for prostitution and debauchery. They contend that it is unreasonable to draw a distinction between the outward and return portions of the trip. (Pet. 6–7, 9, 11–12; Br. 20–26.) A similar distinction was, however, recognized and approved in *Corbett* v. *United States*, 299 Fed. 27 (C. C. A. 9), and *United States* v. *Oriolo*, 49 F. Supp. 226 (E. D. Pa.). Regardless of the vacation motive, petitioners' purpose from the outset was to bring the women back to engage in prostitution. Petitioners were not merely bringing home two women who happened to be prostitutes; they were returning two employees to their work as prostitutes. In these circumstances, the jury could properly find, as they undoubtedly did (see R. 80), that the purpose to have the women engage in prostitution existed at the time petitioners started on the return part of their journey.[10]

[8] *Hughes* v. *United States*, 4 F. (2d) 387 (C. C. A. 8), certiorari denied, 268 U. S. 692; *United States* v. *Winkler*, 299 Fed. 832 (W. D. Tex.).

[9] 41 Stat. 324, 18 U. S. C. 408.

[10] In *United States* v. *Fisher*, 266 Fed. 667 (C. C. A. 4), upon which petitioners rely (Br. 23), the court held that the transportation of a paramour across state lines on a one-

CONCLUSION

The decision below is correct and the case involves no real conflict of decisions and presents no question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1944.

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day visit to relatives was not transportation condemned by the Mann Act. The decision, however, was based on the general rule that illicit relations following the transportation are in themselves insufficient to establish a violation of the Act. The other cases cited by petitioner (Br. 20–25) are inapposite; they hold merely that the requisite intent must exist prior to the interstate transportation.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 559

HANS PETE MORTENSEN AND LORRAINE MORTENSEN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 69–74) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 23, 1943 (R. 74–75). The petition for a writ of certiorari was filed on December 27, 1943, and was granted January 31, 1944 (R. 76). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the circuit court of appeals improperly denied petitioners' application for leave to settle and file their bill of exceptions out of time.

2. Whether, having transported two prostitutes from Grand Island, Nebraska, to Salt Lake City, Utah, petitioners, in returning them to Grand Island, transported them in interstate commerce within the meaning of the Mann Act.

3. Whether the evidence permitted the jury to find that in returning their employee-prostitutes from a vacation point to their house of prostitution, petitioners transported the girls for the purpose of prostitution.

4. Whether the joining conjunctively of the various modes of accomplishing the offense proscribed by Section 2 of the Mann Act rendered the indictment duplicitous, and whether the facts alleged in the indictment sufficiently informed petitioners of the charges against them.

STATUTE AND RULES INVOLVED

Sections 1 and 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 397, 398), known as the Mann Act, provide in part:

> SEC. 1. The term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, * * *.

SEC. 2. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court.

Rules IV, VII, and IX of the Criminal Appeals Rules promulgated by this Court May 7, 1934 (292 U. S. 663–665) provide:

RULE IV. The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceed-

ings relating to the preparation of the record on appeal.

* * * * *

RULE VII. The clerk of the trial court shall immediately notify the trial judge of the filing of the notice of appeal, and thereupon the trial judge shall at once direct the appellant or his attorney, and the United States Attorney, to appear before him and shall give such directions as may be appropriate with respect to the preparation of the record on appeal, including directions for the purpose of making promptly available all necessary transcripts of testimony and proceedings. The action and directions contemplated by this Rule may be had and given by the trial judge at any place he may designate within the judicial district where the conviction was had.

* * * * *

RULE IX. In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the

trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

* * * * *

STATEMENT

On January 28, 1941, petitioners, who are husband and wife (R. 52), were indicted in the United States District Court for the District of Nebraska in two counts charging violations of Section 2 of the Mann Act (*supra*, p. 3), in that, on September 4, 1940, they transported and caused to be transported and aided and assisted in obtaining transportation for and in transporting two girls in interstate commerce from Salt Lake City, Utah, to Grand Island, Nebraska, for the purpose of prostitution and debauchery and with intent to induce, entice and compel the girls to give themselves up to debauchery and to engage in immoral practices (R. 1–2).

After petitioners' preliminary motions had been denied,[1] the case came to trial.

[1] On March 3, 1941, petitioners filed a plea in abatement and motion to quash (R. 2–5) in which they alleged that the facts in the knowledge and possession of the Government did not constitute transportation in interstate commerce within the meaning of the Mann Act; that the indictment did not reflect the facts furnished the grand jury by the women alleged to have been transported by petitioners and that there was a fatal variance between the facts in the knowledge of the Government and the facts alleged in the indictment; that the true facts would require a verdict in favor of petitioners; that if the grand jury was not properly informed as to the law or facts the indictment was returned under a mistake of law and fact and should be quashed; that various facts recited in the moving papers showed that petitioners did not

The evidence adduced at the trial consisted primarily of the testimony of the girls McMahon and Smith, supplemented by the testimony of a maid employed by petitioners, an F. B. I. agent, and a local police official. The testimony, as shown by the reporter's transcript lodged by petitioners with the Clerk of this Court, may be summarized as follows:[2]

For at least one year prior to August 1940 and for at least 1½ years thereafter petitioners occupied the second floor of a building on the edge of the business district in Grand Island, Nebraska (Tr. 10). The premises contained some twelve or fifteen rooms (Tr. 10, 60), which petitioners operated as a rooming house and house of prostitution under the name "Nifty Rooms" (Tr. 9, 61, 64–65, 68, 80).

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have an unlawful intent and did not transport the women in interstate commerce. On March 17 the Government filed a demurrer to the plea in abatement and motion to quash on various grounds (R. 5–6). On April 11, 1941, petitioners filed a second motion to quash (R. 8) in which the allegations previously made were reiterated. The Government then filed an answer to the plea in abatement and the two motions to quash (R. 8–9) in which it incorporated by reference the allegations contained in its earlier demurrer and in which it also denied the allegations in the plea and the motions. On April 16, 1941, the court overruled the Government's demurrer to the plea in abatement, but also overruled petitioners' motions and the plea.

[2] The transcript is in two volumes, one containing the testimony and the other the instructions to the jury. For convenience, the former is referred to as "Tr." and the latter as "2 Tr."; the printed record is referred to as "R."

In 1939 the girls McMahon and Smith started working for petitioners as prostitutes (Tr. 22, 31, 33, 54, 68). Each had a separate room in which she lived and carried on her activities (Tr. 8, 11, 38, 70). They paid the petitioners for their room and board, and also half the proceeds of the prostitution (Tr. 21–22, 24, 70–71, 77). In 1940 petitioners planned a trip from Nebraska to Utah to visit Mrs. Mortensen's relatives, and at the girls' request they agreed to take them along (Tr. 35–37, 39, 49, 73–75).

In the latter part of August 1940 petitioners and the two girls left Grand Island in petitioners' automobile with Mr. Mortensen driving (Tr. 12, 76). They proceeded from the State of Nebraska to Yellowstone National Park (Tr. 13), and from there to Salt Lake City, Utah (Tr. 14, 76). In Salt Lake City all four stayed at a tourist camp for 5 or 6 days, during which they visited Mrs. Mortensen's parents (Tr. 14, 37, 75). The girls, in addition, "went to shows and around in the parks" (Tr. 14). From Salt Lake City they proceeded to return in petitioners' car to Grand Island, Nebraska, stopping for one night in a small town in Colorado (Tr. 15, 16). When they reached Grand Island petitioners drove directly to the "Nifty Rooms," where the parties retired to their respective rooms (Tr. 16–17, 63, 76–77). The girl Smith resumed her work for petitioners as a prostitute on the following day (Tr. 77), while the

girl McMahon did not resume prostitution for a week or ten days because of illness (Tr. 34, 48–49; see also Tr. 20–21). Both girls continued to work as prostitutes for petitioners for a year or more after they returned from Salt Lake City (Tr. 29, 38, 54, 64, 77). The girls paid their own living expenses on the trip, but petitioners paid the expenses of transportation (Tr. 12, 15, 40, 74–75).

No acts of prostitution occurred on the trip (Tr. 39, 47), nor was there any discussion of prostitution in the course of the journey (Tr. 40, 56). Both girls testified that they took the trip for a vacation (Tr. 45), that in the course of the trip they had not given any consideration to their work as prostitutes or made any plans for abandoning their work for petitioners as prostitutes (Tr. 51, 57–58, 75, 80–81, 86). Both girls claimed Grand Island was their residence (Tr. 56–57, 88), and Smith testified that she boarded her child with a family in Grand Island (Tr. 85, 87–88).

At the close of the Government's case, petitioners' "Motion to dismiss the action, and Discharge the jury" was denied (Tr. 105–107, 109–110). The court charged the jury, as requested by petitioners, that purpose was an essential ingredient of the crime and that if the jury found that the transportation from Salt Lake City to Grand Island was planned with no immoral purpose, no crime was committed (2 Tr. 10, 12–13, 18). The court further instructed the jury, at

petitioners' request, that to convict, the jury must find that the Government had proved beyond a reasonable doubt that petitioners transported the two girls from Salt Lake City, Utah, to Grand Island, Nebraska, for the purpose of prostitution and debauchery (2 Tr. 13, 20). The court refused to instruct the jury to acquit if it found that the trip in question commenced and terminated in Grand Island, Nebraska (*id.* 19).

The jury returned a verdict of guilty on both counts (R. 11–12). Petitioners' motion for a new trial was denied (R. 23–24), and on January 15, 1943, they were sentenced to imprisonment for three years on each count, the sentences to run concurrently (R. 13–14). Petitioner Hans Pete Mortensen was, in addition, fined $500 on each count (R. 13).

On January 18, 1943, petitioners filed a notice of appeal (R. 27) and on February 4 an amended notice of appeal (R. 28–29).[3] Under Rule IX of the Criminal Appeals Rules, petitioners were required within thirty days after January 18 to file a bill of exceptions or obtain from the court additional time for such filing. On January 22, the trial judge advised petitioners' attorney by letter of the duty of the court, under Rule VII of the Criminal Appeals Rules, to require the appearance of counsel for directions as to the preparation of the record on appeal. In the letter the

[3] Petitioners were released from custody on bail pending disposition of their appeals (R. 23–27).

judge stated: "Under the rule, the meeting must be prompt, and I therefore wish that you would advise me what time will best suit your convenience and I will set the matter accordingly and advise the United States Attorney". (R. 41–42.) In response to the judge's letter, petitioners' counsel asked for information as to the time within which the transcript and pleadings had to be filed in the circuit court of appeals and suggested that the judge fix his own date for the appearance of counsel (R. 42–43). On February 1 the judge's secretary advised petitioners' counsel by letter (R. 43) that the judge was temporarily confined to a hospital with a cold and directed their attention to Rules VII and IX of the Criminal Appeals Rules, the letter stating where the Rules could be found in the U. S. C. A.

On February 23, not having heard further from petitioners' counsel (R. 44), the judge entered an order (R. 29) requiring counsel on both sides to appear before him on February 26 for directions with respect to preparation of the record. One of petitioners' attorneys appeared on that date (R. 51) but no action appears to have been taken at that time. On February 27, ten days after the expiration of the thirty days, petitioners filed a motion for an extension of time to settle and file a bill of exceptions (R. 38–39) on the ground that the stenographer had not yet prepared the transcript. This motion was denied on the same date, on the ground that no bill of exceptions had been

presented or settled and no extension of time granted during the period of thirty days following the filing of the notice of appeal (R. 39). Pursuant to Rule VIII of the Criminal Appeals Rules, the trial judge ordered that a transcript of the clerk's record of the proceedings be prepared, specifying the various items to be included, for use in the circuit court of appeals (R. 39–41).

Thereafter, on March 18, 1943, petitioners applied to the Circuit Court of Appeals for the Eighth Circuit for an order granting them "the right to have a Bill of Exceptions" and for additional time in which to settle and file it (R. 46–63). In the application petitioners alleged that neither the trial court nor petitioners' counsel had complied with Criminal Appeals Rule VII, in that the judge "did not at once" direct counsel to appear before him and counsel for petitioners "through oversight, inadvertence and mistake" failed to secure an extension of time in which to settle the bill of exceptions (R. 47, 48). The Government objected to the granting of the application principally on the ground that no sufficient cause was shown meriting relief by the court (R. 64–67). On March 24, 1943, the circuit court of appeals entered an order denying the application (R. 68).

When the court, with another division of judges sitting (R. 70), reached the case on the merits, it permitted petitioners to submit, but not file, a

copy of the reporter's transcript of the evidence[1] "in order that we might assure ourselves that no fundamental injustice had been done by the previous denial of an extension, and that we would not, because of the absence of a bill of exceptions, be affirming a conviction which was not properly an offense under the Act" (R. 70–71n). Petitioners asserted the same contentions before that court as they now urge in this Court. The court, in affirming the judgment, held, Judge Woodrough dissenting, that petitioners had transported the girls in interstate commerce within the meaning of Section 1 of the Mann Act, and that when petitioners transported the girls from Salt Lake City, Utah, to Grand Island, Nebraska, they intended that the girls should re-enter their house of prostitution; consequently, the transportation was for the purpose of prostitution and debauchery (R. 69–73).

SUMMARY OF ARGUMENT

I

Although petitioners' bill of exceptions was not filed in time, the court below examined the transcript of the record and passed upon the merits of the case before finally denying petitioners leave to file out of time. Accordingly we do not object to this Court's treating the transcript as a part of the record.

[1] This transcript has been lodged by petitioners' counsel with the Clerk of this Court.

II

There is no merit to petitioners' contention that a journey beginning in one state, going through other states, and returning to the original state is not interstate commerce. In any event the transportation in question here was from Utah to Nebraska.

III

The undisputed evidence that petitioners operated a house of prostitution in Nebraska, that they transported two of the girls who worked for them to Salt Lake City and return, and that the girls resumed their prostitution shortly after their return warrants the jury in inferring that a purpose of petitioners in bringing the girls back was that they should resume their prostitution. The fact that the object of the trip from Nebraska to Utah was to enjoy a vacation does not preclude the existence, on the journey back to Nebraska, of a purpose to return the girls to their work as prostitutes in petitioners' employ.

IV

The indictment is not duplicitous in charging in the conjunctive the various methods of committing the offense described in the statute. The use of "and" rather than "or" has been held necessary in order to avoid uncertainty and duplicity. The indictment was sufficiently definite to inform petitioners of the charge against them.

ARGUMENT

I

THE QUESTION AS TO THE TIMELINESS OF THE BILL OF EXCEPTIONS

The determination of the sufficiency of the Government's proof to show a violation of Section 2 of the Mann Act depends upon the presence before this Court of the evidence taken at the trial and the court's instructions to the jury. Yet as we have shown in the Statement, *supra*, pp. 9–10, no bill of exceptions was settled and filed during the period of thirty days following the filing of the Notice of Appeal, as required by Criminal Appeals Rule IX, and no extension of time was requested or granted during that period. The trial judge, thereafter, had no authority under Rule IX to grant petitioners' subsequent application for an extension of time,[5] and accordingly properly denied petitioners' untimely application for an extension (R. 38–39).

The circuit court of appeals had such authority, under Rule IV of the Criminal Appeals Rules.[6] The division of that court before which petitioners' application for additional time to prepare

[5] *Ray* v. *United States*, 301 U. S. 158, 162; *Long* v. *United States*, 90 F. (2d) 482, 483 (C. C. A. 9), certiorari denied, 302 U. S. 730; *Wainer* v. *United States*, 87 F. (2d) 77 (C. C. A. 7), certiorari denied, 300 U. S. 669.

[6] *Kay* v. *United States*, 303 U. S. 1, 9–10; *Forte* v. *United States*, 302 U. S. 220, 223; *Ray* v. *United States*, 301 U. S. 158, 164.

and file their bill of exceptions first came denied the application without opinion or explanation (R. 68). This ruling would appear to have been an exercise of "sound judicial discretion." *Ray* v. *United States,* 301 U. S. 158, 166. For the attention of petitioners' counsel had been called to Rule IX on February 1, over two weeks before the expiration of the thirty days, and in ample time for counsel at least to have requested an extension of time. Petitioners charge that the delay was due in part to the courtesy of the trial judge in requesting their counsel to set a time to suit his convenience instead of mandatorily fixing the date himself. But in the circumstances this is not an adequate excuse, since it was the primary responsibility of petitioners' counsel to make sure that the bill was filed in the proper time. Petitioners do not deny the negligence of their counsel, and unless the inexcusable failure of counsel to comply with the Rules is never to be charged to a criminal defendant, the denial of petitioners' application by the circuit court of appeals in the first instance cannot be deemed an abuse of discretion.

When the case subsequently came before another division of the circuit court of appeals for argument, the court allowed counsel to leave with it, but not to file, a transcript of the evidence in order that it "would not, because of the absence of a bill of exceptions, be affirming a conviction

which was not properly an offense under the Act" (R. 70–71n). The court then treated the case as if the transcript were before it, and sustained petitioner's conviction on the merits. Having reached the conclusion that there was no merit in petitioners' contention, and that the result would have been no different if a bill of exceptions had been allowed, the court refused to permit the transcript to be filed.

This course of proceeding indicates that the division of the court below which heard the argument[7] would have allowed the bill to be filed if it had been of the view that there was merit in petitioners' substantive contentions. It purported to exercise discretion on no other basis. Petitioners have properly presented to this Court the question as to the correctness of the ruling below disallowing the filing of the bill of exceptions (Pet. pp. 7, 10, 26–30). Inasmuch as the court below relied entirely on its views as to the merits of the case, it would be appropriate for this Court to reverse that ruling if it thought the decision below wrong on the merits. But it would be futile for this Court then to remand the case in order to permit the filing of the bill of exceptions, as the merits would already have been conclusively adjudicated. It would also be useless for this Court,

[7] We think the second division of the court to hear the case had power to treat petitioners' renewed request for permission to file the bill of exceptions as a motion for rehearing of the decision of the first division of the court.

without first considering the merits, to remand the case in order to permit the court below to allow the filing of the bill and the consideration of the case in that posture, inasmuch as the court below has already decided the case just as if the bill had been filed. In these peculiar circumstances, in order to avoid further fruitless litigation and delay in the determination of issues which must eventually be decided by this Court, we believe that this Court may appropriately treat the transcript now lodged with the Clerk as a part of the record, and we have no objection to its doing so.

II

IN TRANSPORTING THE GIRLS FROM SALT LAKE CITY, UTAH, TO GRAND ISLAND, NEBRASKA, PETITIONERS TRANSPORTED THEM IN INTERSTATE COMMERCE WITHIN THE MEANING OF SECTION 1 OF THE MANN ACT

Section 2 of the Mann Act applies to transportation "in interstate or foreign commerce." Section 1 provides:

> The term "interstate commerce," as used in this Act, shall include transportation from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, * * *.

Petitioners contend that the Act does not apply to transportation passing through several states but beginning and ending in the same state. They

requested the court so to charge the jury, but the request was refused (R. 12).

The answer to petitioners' argument is twofold. In the first place, petitioners were charged with transporting the girls from Salt Lake City, Utah, to Grand Island, Nebraska. The evidence shows, and petitioners do not deny, that this transportation occurred. Nor do they deny that transportation from Utah to Nebraska is interstate commerce. Petitioners contend, however, that the journey must be viewed as a single round trip from Grand Island to Grand Island. The evidence does not show any such continuous travel as to constitute a single interstate movement. On the contrary, the parties stayed five to six days in Salt Lake City, and then drove directly back to Grand Island in two days. If a person travels to a particular place, stays for a few days, whether on business or pleasure, and then returns to his starting point, he has, in common parlance, made two trips, one out and one back.

But even if petitioners were correct in treating the vacation as a single journey, it would not aid them. This Court and others have repeatedly held that movement between points in the same state through another state is interstate commerce,* and petitioners do not seem to deny that this is a proper interpretation of the commerce

* *Missouri Pacific Railroad Company* v. *Stroud*, 267 U. S. 404; *Western Union Telegraph Company* v. *Speight*, 254 U. S. 17; *Hanley* v. *Kansas City Southern Railway Company*, 187 U. S. 617; *Michael* v. *United States*, 7 F. (2d) 865, 866

clause. Their argument apparently is that "interstate commerce" as used in the Mann Act must be more narrowly construed because Section 1 of that Act states that "'interstate commerce,' * * * shall include transportation from any State * * * to any other State."[9] But that language certainly does not require "interstate commerce" to be given less than its full constitutional meaning. In the first place, transportation from state A to state B is from one state to another state within the literal meaning of the statute, even though it be preceded or followed by transportation from state B to state A. Secondly, the history of the Act shows that Congress employed the term "interstate commerce" in its ordinary constitutional sense. See H. Rep. No. 47, pp. 1–5, and S. Rep. No. 886, pp. 1–2, 7–10, 61st Cong., 2d Sess.[10] And, if it be thought

(C. C. A. 7); *United States* v. *Yohn*, 280 Fed. 511 (C. C. A. 2); *United States* v. *Yohn*, 275 Fed. 232 (S. D. N. Y.); *United States* v. *Moynihan*, 258 Fed. 529 (C. C. A. 3); *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269 (C. C. S. D. N. Y.); *Roundtree* v. *Terrell*, 22 F. Supp. 297 (N. D. Tex.).

[9] The trial judge instructed the jury, on this phase of the case, that interstate commerce involved commerce "from one state to another" (2 Tr. 4). This instruction would seem to be in full conformity to the language of the statute.

[10] In *United States* v. *Burch*, 226 Fed. 974, 975 (N. D. Cal.), the Court stated with respect to this provision in the Mann Act:

"* * * I do not think Congress defined or intended to define the term "interstate commerce" in this section, but only to declare that the territories and the District of Columbia should be included in the term 'interstate,' as well as the various states."

that commerce "from any State * * * to any other State' 'is narrower than "interstate commerce," the use of the word "includes" shows that Section 1 of the Act is not to be taken as an "all-embracing definition." *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 100; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 189; *Helvering* v. *Morgan's Inc.*, 293 U. S. 121, 125.

Petitioner cites only *United States* v. *Wilson*, 266 Fed. 712 (E. D. Tenn.), which does hold the Mann Act inapplicable to a single train trip between points in the same state but passing through another state.[11] But, as was said in *United States* v. *Winkler*, 299 Fed. 832, 834 (W. D. Tex.), the *Wilson* case "seems to stand alone, without authority to sustain it, and out of harmony with all other cases upon the same subject." For inconsistent cases under the Mann Act, see *Burgess* v. *United States*, 294 Fed. 1002 (App. D. C.); *Corbett* v. *United States*, 299 Fed. 27 (C. C. A. 9); *United States* v. *Oriolo*, 49 F. Supp. 226 (E. D. Pa.); *Ghadiali* v. *United States*, 17 F. (2d) 236, 237–238 (C. C. A. 9), certiorari denied, 274 U. S. 747. For inconsistent cases under the Motor Vehicle Theft Act (18 U. S. C. 408), which contains the same definition of interstate commerce, see

[11] It should be noted that in the *Wilson* case there was an uninterrupted, single "through transportation" between points in the same state, and that the passage through the second state could be regarded as fortuitous or incidental. This cannot be said of the interstate features of the transportation in the case at bar.

Hughes v. *United States*, 4 F. (2d) 387 (C. C. A. 8), certiorari denied, 268 U. S. 692; *United States* v. *Winkler*, *supra*. Compare *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269 (C. C. S. D. N. Y), decided under the Elkins Act (49 U. S. C., Sec. 41).

III

THE EVIDENCE WAS SUFFICIENT TO WARRANT THE JURY'S FINDING THAT PETITIONERS TRANSPORTED THE GIRLS FOR THE PURPOSE OF PROSTITUTION

The prohibitions of the Mann Act apply to persons who transport girls in interstate commerce "for the purpose of prostitution or debauchery or for any other immoral purpose." Immoral conduct on a journey or at its conclusion is not sufficient to violate the Act unless the trip is taken for that purpose.[12] Nor is it sufficient that the parties merely contemplate immoral conduct at the end of the journey if the necessary purpose is lacking.[13] But the immoral purpose need not be the sole object of the journey; the additional presence of a legitimate purpose is immaterial, if one of the ob-

[12] *United States* v. *Grace*, 73 F. (2d) 294 (C. C. A. 2); *Sloan* v. *United States*, 287 Fed. 91 (C. C. A. 8); *Fisher* v. *United States*, 266 Fed. 667 (C. C. A. 4); *Van Pelt* v. *United States*, 240 Fed. 346 (C. C. A. 4); *Hunter* v. *United States*, 45 F. (2d) 55 (C. C. A. 4); *Welsch* v. *United States*, 220 Fed. 764 (C. C. A. 4); *Alpert* v. *United States*, 12 F. (2d) 352 (C. C. A. 2); *Yoder* v. *United States*, 80 Fed. (2d) 665 (C. C. A. 10).

[13] *Hansen* v. *Haff*, 291 U. S. 559; *Caminetti* v. *United States*, 242 U. S. 470, 491; *Sloan* v. *United States*, *supra*; *Van Pelt* v. *United States*, *supra*; *Thorn* v. *United States*, 278 Fed. 932 (C. C. A. 8).

jects of the transportation falls within the statutory bar.[14] And it is elementary that in such cases the purpose of the defendant may be inferred by a jury from his conduct.[15]

The undisputed evidence showed that for some time prior to the transportation in question petitioners jointly operated a house of prostitution and that the girls worked for them as prostitutes, turning over to them one-half of the proceeds. In August 1940, petitioners transported the girls to Salt Lake City for a vacation, intending at that time to return them to their house of prostitution upon completion of the vacation.[16] In accord with this intention, when petitioners transported the girls back to Grand Island, they took

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[14] Thus, in *Ghadiali* v. *United States*, 17 F. (2d) 236, 237-238 (C. C. A. 9), certiorari denied, 274 U. S. 747, the court held the Act applicable to a man who transported a girl so that she could both act as his secretary and as his mistress. To the same effect, see *Carey* v. *United States*, 265 Fed. 515, 517 (C. C. A. 8); *Van Pelt* v. *United States*, 240 Fed. 346, 349 (C. C. A. 4); *Yoder* v. *United States*, 80 F. (2d) 665, 672 (C. C. A. 10); *Aplin* v. *United States*, 41 F. (2d) 495, 496 (C. C. A. 9).

[15] *Ghadiali* v. *United States*, *supra*; *United States* v. *Reginelli*, 133 F. (2d) 595 (C. C. A. 3), certiorari denied, 318 U. S. 783; *Neff* v. *United States*, 105 F. (2d) 688, 691 (C. C. A. 8); *Aplin* v. *United States*, *supra*. In the last case cited the court stated, "Purpose or intent is generally proved by circumstantial evidence, and may be so proved under all the authorities.

[16] Petitioners do not contend that the vacation was anything more than an interlude in their operation of the brothel and the work of the girls as prostitutes. The concept of "vacation" itself implies that the vacationer is to resume his former activities upon his return (see R. 80-81, 58).

them directly to their house of prostitution, and the girls resumed prostitution for petitioners' profit.

The question is whether, on these facts, the jury could properly infer that a purpose of the petitioners in transporting the girls back to Grand Island was to enable them to resume their activities as prostitutes.

The issue was properly presented to the jury by the court's charge, of which petitioners do not complain. Indeed, the court gave petitioners' requested instruction on the point. The court charged that petitioners should be acquitted if the jury found that the transportation from Salt Lake City to Grand Island "* * * was without any plan, purpose, or intent that the said girls would engage in prostitution or debauchery and that upon their return no such plan was thereafter formed before entering the State of Nebraska * * *" (2 Tr. 10). On petitioners' request, the court gave two additional instructions, including a charge to acquit "if the journey was planned with no immoral purpose at the time," and the statement that "it is the immoral purpose which renders interstate commerce criminal." [17]

[17] The original charge was as follows (2 Tr. 10):

"If you find that the charge in the indictment, that the transportation of the girls, as named, was from the city of Salt Lake City, Utah, to the city of Grand Island, Nebraska, was without any plan, purpose, or intent that the said girls would engage in prostitution or debauchery and that upon their return no such plan was thereafter formed before en-

The petitioners did not testify and there is no direct evidence as to what was in their minds on the trip back to Grand Island. But it cannot be and is not denied that they anticipated or knew that the girls were to go back to work as prostitutes. Inasmuch as they employed the girls in their own brothel and shared in the proceeds of the prostitution, we think that the jury could properly infer that at least one purpose of petitioners in transporting the girls back from Salt Lake City was to enable them to resume their im-

tering the State of Nebraska, then no crime was committed and you should acquit the defendant. But on the other hand, if at the time such journey was completed [*sic*], or any time before or any time thereafter before the State of Nebraska had been entered or at the time of the entry of the State of Nebraska, such a purpose and plan and intent was formed, then the crime was committed and in such case if you find beyond a reasonable doubt you should convict the defendant."

Instructions requested by petitioners, as given by the court, were as follows (2 Tr. 12–13, 18, 20):

"Instruction No. 1 requested. The jury is instructed that the United States Code makes the intent and purpose an element of the crime, and if the journey was planned with no immoral purpose at the time, no crime was committed, no matter what may have occurred thereafter. It is the immoral purpose which renders interstate commerce criminal. If you find from the evidence that the journey in this case was planned with no immoral purpose and with no intent and purpose to induce, entice and compel the said girls, named in the indictment, to give themselves up to debauchery and engage in immoral practices, then you shall find the defendants and each of them not guilty on each count of the indictment.

"Instruction No. 2 requested by the defendants. You are instructed that if you find from the evidence that the Gov-

moral conduct, which they did.[18] It is of course the function of the jury and not of the reviewing court to draw inferences of fact from the evidence.[18] See p. 22, n. 15, *supra*. Cf. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, and cases there cited.

The fact that the transportation was a part of a trip undertaken as a vacation does not negative the existence of such a purpose. If a person takes a vacation from an ordinary employment, one of the purposes of his return trip would normally be to go back to work; indeed that is often the main reason. And if he was taken on the vacation by his employer, it would be fair to infer that a purpose of the employer in bringing him back was that he might resume his work. This assumption is no less appropriate when the business activity to be resumed is prostitution, as it is here.

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ernment has failed to prove beyond a reasonable doubt that the defendants transported the two women, named in the indictment, from Salt Lake City, Utah, to Grand Island, Nebraska, on or about September 4, 1940, for the purpose of prostitution and debauchery; or that the Government failed to prove beyond a reasonable doubt that on or about September 4, 1940, the defendants or either of them had an intent or purpose to entice, induce, or compel said women, named in the indictment, or either of them, to give themselves up to debauchery or prostitution and to engage in immoral practices, and which intent or purposes was not formed before they entered the State of Nebraska, then you shall find the defendants, and each of them, not guilty on each of the counts of the indictment."

[18] The court below apparently thought this conclusion obvious, even apart from the jury's verdict (R. 71).

Petitioners argue (Br. pp. 26, 28) that the immoral intention must have existed before the conclusion of the journey. This can be conceded, since an immoral purpose could not otherwise motivate the transportation. But the evidence to which we have referred permitted the jury to draw the inference that petitioners' purpose to bring the girls back to prostitution existed at the commencement of and during the trip from Utah to Nebraska—that they brought them back for the purpose of doing what in fact they did. The court presented this issue to the jury in the manner requested by petitioners. See p. 23, *supra*.

In several cases it has been held that transportation on the return portion of a round trip violated the Act even though the outgoing journey was lawful. *United States* v. *Oriolo*, 49 F. Supp. 226 (E. D. Pa.); *Corbett* v. *United States*, 29 Fed. 27 (C. C. A. 9); *Burgess* v. *United States*, 294 Fed. 1002 (App. D. C.).

In the *Oriolo* case the defendant took a prostitute who worked for him on a one-day outing from Philadelphia to Atlantic City and returned her to Philadelphia, where she again resorted to prostitution for him. On the way back the defendant told the girl that "she would have to resume prostitution in Philadelphia to enable him" to pay a fine which had been imposed upon him in Atlantic City. The Government's case was predicated on the return journey from Atlantic City to Philadelphia. In upholding the conviction,

the court held that the fact that the girl worked for the defendant as a prostitute both before and after the interstate journey and the defendant's statement to her in Atlantic City "present a picture from which a jury could properly infer that the defendant transported the woman over State boundaries in order that she might again work for him as a prostitute * * *." 49 F. Supp., at p. 227.

The *Corbett* case presents a somewhat similar situation involving, however, irregular immorality rather than commercialized prostitution. There the woman, who had been having immoral relations with the defendant in Boise, Idaho, went to Spokane, Washington, to visit her children. After an absence of a month she came back to Boise with money furnished by the defendant. The woman testified that "when she left Boise, she intended to return and resume her work as a waitress in a restaurant, and had left her effects in her room" (299 Fed., at p. 28). In affirming the conviction the Circuit Court of Appeals for the Ninth Circuit concluded (p. 29):

> It is plain that the trip made by Mrs. Bishop from Boise to Spokane was to see her children, and for no other purpose; but the trip from Spokane to Boise, made a month later, is the one described in the indictment, and is distinct from the journey to Spokane. Corbett gave Mrs. Bishop the money for the trip, which the evidence goes to show was taken in response to Cor-

bett's express request, and, in the light of circumstances surrounding the conduct of the two after her arrival at Boise, it was for the jury to say what the intention and purposes of Corbett were in the transportation.

The cases cited by petitioners are not inconsistent with these conclusions. They stand for the undisputed propositions with which we began our discussion (p. 21). They involved private immorality on or after journeys taken for legitimate purposes; persons who had previously engaged in illicit relations continued to do so on trips to visit relatives,[19] trips taken for business reasons,[20] or a trip taken to await the birth of a child.[21]

Hansen v. *Haff*, 291 U. S. 559, which approves these authorities, is of the same character. In that case a woman who had lived in this country working as a domestic and who was engaging in illicit relations with a married man visited her family in Europe travelling with her paramour. She returned to this country with him, intending to resume her former occupation and ways. The Court held that the mere contemplation of sexual intercourse did not make that the purpose of her reentry into this country within the meaning of

[19] *Sloan* v. *United States*, 287 Fed. 91 (C. C. A. 8); *Fisher* v. *United States*, 266 Fed. 667 (C. C. A. 4); *Welsch* v. *United States*, 220 Fed. 764 (C. C. A. 4).

[20] *Yoder* v. *United States*, 80 F. (2d) 665, 669–670 (C. C. A. 10); *Alpert* v. *United States*, 12 F. (2d) 352 (C. C. A. 2).

[21] *Van Pelt* v. *United States*, 240 Fed. 346 (C. C. A. 4).

the Immigration Act of 1917 (8 U. S. C. § 155). Her intention was "to resume her employment as a domestic" (291 U. S., at 562). The decision as to the immoral purpose of her entry would undoubtedly have been different if her intent had been to resume employment as a prostitute (Cf. *Lapina* v. *Williams*, 232 U. S. 78; *Ex parte Pouliot*, 196 Fed. 437 (E. D. Wash.)); the case would then have been comparable to the situation here.

IV

THE INDICTMENT IS NOT DEFECTIVE

Petitioners attack the indictment in two respects. They contend (Br. 13–17) it is duplicitous because it charges that petitioners transported, caused to be transported, and aided and assisted in obtaining transportation, and in transporting the women in question (Br. 13). This contention is patently without merit. As this Court said in *Crain* v. *United States*, 162 U. S. 625, 636:

> We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute.

To the same effect, see *Blain* v. *United States*, 22 F. (2d) 393 (C. C. A. 8); *United States* v. *Malaga*, 57 F. (2d) 822, 825 (C. C. A. 1); *United States* v.

Delaware, L. & W. R. Co., 152 Fed. 269 (C. C. S. D. N. Y.). The fact that the statutory language is in the disjunctive furnishes no support for petitioners' assertion (Br. 13–17) that the indictment may not state the elements of the statute conjunctively. *Poffenbarger* v. *United States*, 20 F. (2d) 42, 43–44 (C. C. A. 8); *O'Neill* v. *United States*, 19 F. (2d) 322, 324 (C. C. A. 8); *Ackley* v. *United States*, 200 Fed. 217, 221 (C. C. A. 8); *Pines* v. *United States*, 123 F. (2d) 825, 828–829 (C. C. A. 8); *Troutman* v. *United States*, 100 F. (2d) 628, 631 (C. C. A. 10). Indeed the courts have held that in such situations the use of "and" instead of "or" is necessary to avoid uncertainty and duplicity. See *Poffenbarger* v. *United States*, *O'Neill* v. *United States*, and *Ackley* v. *United States*, all *supra*. Petitioners apparently concede that this is the usual rule,[22] but they contend that it can only be applied "when there is no inconsistency between any of the various ways it is alleged that the defendant employed to commit the offense" (Br. p. 18). But there is no inconsistency between the various acts charged in the

[22] Petitioners state in their brief (p. 18):

"We are familiar with the rule of law which has been applied in numerous cases, and that is, that an indictment can follow the language of the statute and may contain a number of ways in which an offense could be committed, if the different ways are connected by the conjunctive "and" and not the disjunctive "or," but it is our contention that such a course of procedure can be followed legally, only when there is no inconsistency between any of the various ways it is alleged that the defendant employed to commit the offense."

indictment, and petitioners have pointed to none. The evidence shows that petitioners (a) transported the girls, (b) caused them to be transported, (c) aided and assisted them in obtaining transportation, and (d) aided and assisted in transporting them. Each of these offenses may be found in the same conduct, but they are not inconsistent.

Petitioners also contend that the indictment is so indefinite as not to inform them as to the precise charge attempted to be made against them (Br. 17–19). To the contrary, the indictment follows closely the language of the statute, fixes the date of the transportation, specifies the initial and terminal points of the transportation and the purpose for which the women were transported. Cf. *United States* v. *Lepowitch*, 318 U. S. 702, 704; *Potter* v. *United States*, 155 U. S. 438, 444; *Hagner* v. *United States*, 285 U. S. 427, 431; *Hughes* v. *United States*, 114 F. (2d) 285, 288 (C. C. A. 6). If petitioners desired greater specificity of factual detail properly to prepare their defense, they could have moved for a bill of particulars. Not only did they fail to do so, but their plea in abatement and motion to quash (R. 4–5) and their offer to produce facts (R. 6–7) showed that they were fully familiar with the details of the offense charged long in advance of the trial; indeed these documents recite substantially all of the evidence that was brought out at the trial. Obviously their contention that they were

not informed of the charge against them is without foundation.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 559.—October Term, 1943.

Hans Pete Mortensen and Lorraine Mortensen, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 15, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

We granted certiorari in this case to review the judgment of the Circuit Court of Appeals affirming the conviction of petitioners under Section 2 of the White Slave Traffic Act, popularly known as the Mann Act.[1] 139 F. 2d 967.

Following their conviction by the jury in the District Court, petitioners filed a notice of appeal to the Circuit Court of Appeals. However, they failed to file a timely bill of exceptions in the District Court. Thereafter they applied to the Circuit Court of Appeals for an order granting them "the right to have a Bill of Exceptions" and for additional time in which to settle and file it. This application was denied without opinion or explanation. When the case subsequently came before another division of judges of that court for argument on the merits, petitioners renewed their request for permission to file a bill. This was, in effect, a motion for rehearing of the decision of the first division of judges of the court. Counsel was then allowed by the court to leave with it, but not to file, a copy of the reporter's transcript of the evidence "in order that we might assure ourselves that no fundamental injustice had been done by the previous denial of an extension and that we would not, because of the absence of a bill of exceptions, be affirming a conviction which was not properly an offense under the Act." 139 F. 2d at 969, note 1. The court then treated the case as though the transcript were properly before it and sustained petitioners' conviction on the merits. Having reached the conclusion that there was no merit in petitioners' contentions and

[1] Act of June 25, 1910, § 2, 36 Stat. 825, 18 U. S. C. § 398.

that the result would have been the same had a bill of exceptions been filed, the court refused to permit the "purported" transcript to be filed. No other reason was given for this refusal.

Petitioners have raised before us the propriety of the action of the court below, claiming that they thereby have been prevented from urging and arguing certain assignments of error which they wished to urge. It is clear from Rule IV of the Criminal Appeals Rules[2] that the Circuit Court of Appeals has the right to exercise sound judicial discretion in supervising and controlling the proceedings on appeal. *Ray* v. *United States*, 301 U. S. 158, 166-167; *Forte* v. *United States*, 302 U. S. 220, 223; *Kay* v. *United States*, 303 U. S. 1, 9-10; *Miller* v. *United States*, 317 U. S. 192, 199. This includes the right to grant or deny belated applications for permission to file bills of exceptions. And the court's action in the matter is not reviewable in this Court absent a clear abuse of discretion.

But under the peculiar circumstances of this case it is unnecessary to determine whether the court below abused its discretion in refusing to allow a bill to be filed. When that court examined the transcript of the evidence and conclusively adjudicated the merits, it accomplished in substance all that would have been achieved if the formality of filing the transcript had occurred and the court had then passed upon the merits. In order that petitioners shall not be unfairly deprived of the right to seek a review of that court's determination of the merits, we may consider the court's action as in effect having approved the filing of the transcript as a bill of exceptions. A copy of the transcript has been lodged with the Clerk of this Court and no question has been raised as to its correctness or completeness. In accordance with the Government's suggestion and in the exercise of our supervisory appellate power, we shall treat the transcript as a part of the record before us and consider the case on its merits.

The petitioners, man and wife, operated a house of prostitution in Grand Island, Nebraska. In 1940 they planned an automobile trip to Salt Lake City, Utah, in order to visit Mrs. Mortensen's parents. Two girls who were employed by petitioners as prostitutes asked to be taken along for a vacation and the Mortensens agreed to their request. They motored to Yellowstone National

[2] 292 U. S. 661, 663 18 U. S. C. A. following § 688.

Park and then on to Salt Lake City, where they all stayed at a tourist camp for four or five days. They visited Mrs. Mortensen's parents and, in addition, the girls "went to shows and around in the parks" and saw various other parts of the city. The four then returned in petitioners' automobile to Grand Island; on arrival they drove immediately to petitioners' house of ill fame and retired to their respective rooms. The following day one of the girls resumed her activities as a prostitute in petitioners' employ, while the other did not resume such activities for a week or ten days because of illness. Both girls continued to act as prostitutes for petitioners for a year or more after their return from Salt Lake City.

It is undisputed that this was purely a vacation trip, with the two girls paying their own living expenses and petitioners bearing the expenses of transportation. One of the girls had offered to help pay for the transportation, but petitioners refused on the ground that the cost would remain the same even if the girls did not accompany them. No acts of prostitution or other immorality occurred during the two-week trip and there was no discussion of such acts during the course of the journey. Both girls testified that during the trip they gave no consideration to their work as prostitutes and made no plans to abandon such activities. There was also uncontradicted evidence that the two girls were under no obligation or compulsion of any kind to return to Grand Island to work for petitioners. They were free at any time before, during or after the vacation excursion to leave petitioners' employ and engage in their own pursuits. Both girls claimed that Grand Island was their residence, one of them testifying that she boarded her child with a family in that city.

Petitioners were charged in two counts with violating Section 2 of the Mann Act in that they transported and caused to be transported, and aided and assisted in obtaining transportation for and in transporting, two girls in interstate commerce from Salt Lake City to Grand Island for the purpose of prostitution and debauchery, and with intent to induce, entice and compel the girls to give themselves up to debauchery and to engage in immoral practices. The jury was charged that purpose was an essential ingredient of the crime and that if the jury found that the transportation from Salt Lake City to Grand Island was planned with no immoral purpose, no crime was committed. The jury was also

told that, to convict, it must find that the Government had proved beyond a reasonable doubt that petitioners transported the girls from Salt Lake City to Grand Island for the purpose of prostitution and debauchery. The jury returned a verdict of guilty on both counts. This conviction was affirmed by the Circuit Court of Appeals under circumstances previously described.

The primary issue before us is whether there was any evidence from which the jury could rightly find that petitioners transported the girls from Salt Lake City to Grand Island for an immoral purpose in violation of the Mann Act.

The penalties of Section 2 of the Act are directed at those who knowingly transport in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice." The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes. To constitute a violation of the Act, it is essential that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities. *Hansen* v. *Haff*, 291 U. S. 559, 563. An intention that the women or girls shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.

Since the issue as to whether petitioners intended that the two girls should resume their immoral conduct on their return to Grand Island and transported them in interstate commerce for that purpose was submitted to the jury with appropriate instructions we would normally be precluded from reviewing or disturbing the inferences of fact drawn from the evidence by the jury. But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. Cf. *Abrams* v. *United States*, 250 U. S. 616, 619. Our examination of the record in this case convinces us that there was a complete lack of relevant evidence

from which the jury could properly find or infer, beyond a reasonable doubt, that petitioners transported the girls in interstate commerce "for the purpose of prostitution or debauchery" within the meaning of the Mann Act.

It may be assumed that petitioners anticipated that the two girls would resume their activities as prostitutes upon their return to Grand Island. But we do not think it is fair or permissible under the evidence adduced to infer that this interstate vacation trip, or any part of it, was undertaken by petitioners for the purpose of, or as a means of effecting or facilitating, such activities. The sole purpose of the journey from beginning to end was to provide innocent recreation and a holiday for petitioners and the two girls. It was a complete break or interlude in the operation of petitioners' house of ill fame and was entirely disassociated therefrom. There was no evidence that any immoral acts occurred on the journey or that petitioners forced the girls against their will to return to Grand Island for immoral purposes. What Congress has outlawed by the Mann Act, however, is the use of interstate commerce as a calculated means for effectuating sexual immorality. In ordinary speech an interstate trip undertaken for an innocent vacation purpose constitutes the use of interstate commerce for that innocent purpose. Such a trip does not lose that meaning when viewed in light of a criminal statute outlawing interstate trips for immoral purposes.

The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitrary splitting of the round trip into two parts so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal. The return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended. Guilt or innocence does not turn merely on the direction of travel during part of a trip not undertaken for immoral ends. If the return journey was illegal, so was the outgoing one since all intended, from the beginning, to end the journey where it began, at Grand Island. The outward leg

of the trip was interstate transportation. Yet it was not charged, and could not well be, that proof of this part of the trip was a violation of the Act. It differed in no respect from the other part, except in the direction of travel. That is not enough to make the first part innocent, the last part illegal. Criminal intent and purpose must be grounded on something less ingenious than that which is necessary to sustain a finding of such a purpose in making the return interstate journey to Grand Island. "People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance." *Hansen* v. *Haff*, *supra*, 563-564. Cf. *Ex parte Rocha*, 30 F. 2d 823.

An artificial and unrealistic view of the nature and purpose of the return journey to Grand Island is necessary to sustain this conviction. But we are unwilling to sanction the application of the Mann Act in a manner that is so manifestly unfair. Whatever their faults, petitioners are entitled to have just and fair treatment under the law and not to be punished for transporting girls in interstate commerce for a purpose wholly different from any of the purposes condemned by Congress.

We do not here question or reconsider any previous construction placed on the Act which may have led the federal government into areas of regulation not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have a similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions "are liable to furnish boundless opportunity to hold up and blackmail and make unnecessary trouble, without any corresponding benefits to society."[3]

To punish those who transport inmates of a house of prostitution on an innocent vacation trip in no way related to the practice of their commercial vice is consistent neither with the purpose nor with the language of the Act. Congress was attempting primarily to eliminate the "white slave" business which uses inter-

[3] 45 Cong. Rec. 1033.

state and foreign commerce as a means of procuring and distributing its victims and "to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."[4] Such clearly was not the situation revealed by the facts of this case. To accomplish its purpose the statute enumerates the prohibited acts in broad language capable of application beyond that intended by the legislative framers. But even such broad language is conditioned upon the use of interstate transportation for the purpose of, or as a means of effecting or facilitating, the commission of the illegal acts. Here the interstate round trip had no such purpose and was in no way related to the subsequent immoralities in Grand Island. In short, we perceive no statutory purpose or language which prohibits petitioners under these circumstances from using interstate transportation for a vacation or for any other innocent purpose.

The judgment of the court below is

Reversed.

[4] H. Rep. No. 47, p. 10 (61st Cong., 2d Sess.). The same statement appears in S. Rep. No. 886, p. 10 (61st Cong., 2d Sess.). See also 45 Cong. Rec. 805, 821, 1035, 1037.

Mr. Chief Justice STONE,

Mr. Justice BLACK, Mr. Justice REED, Mr. Justice DOUGLAS and I think the judgment should be affirmed.

Courts have no more concern with the policy and wisdom of the Mann Act than of the Labor Relations Act or any other which Congress may constitutionally adopt. Those are matters for Congress to determine, not the courts. Congress, in enacting the Mann Act, declared in unmistakable terms that any person who should transport across state lines "any woman . . . for the purpose of prostitution . . . or with intent and purpose to induce . . . such woman to give herself to debauchery or to engage in any other immoral practice . . . shall be deemed guilty of a felony".

The fact that petitioners, who were engaged in an established business of operating a house of prostitution in Nebraska, took some of its women inmates on a transient and innocent vacation trip to other states, is in no way incompatible with the conclusion

that petitioners, in bringing them back to Nebraska, purpose and intended that they should resume there the practice of com mercial vice, which in fact they did promptly resume in pet tioners' establishment. The record is without evidence that the engaged, or intended to engage in any other activities in Nebraska or that anything other than the practice of their profession wa the object of their return. For this reason the case is controlle by *Lapina* v. *Williams*, 232 U. S. 78, rather than by *Hansen* v *Haff*, 291 U. S. 559. The jury was properly instructed, its ver dict is supported by ample evidence, and the two courts belo rightly sustained it.